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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 22

EMINENT DOMAIN

Chap.

Law reviews. — For article, "A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence," see 51 Mercer L. Rev. 11 (1999).

RESEARCH REFERENCES

Am. Jur. Trials. — Condemnation of Rural Property for Highway Purposes, 8 Am. Jur. Trials 57.

Condemnation of Urban Property, 11 Am. Jur. Trials 189.

Condemnation of Easements, 22 Am. Jur. Trials 743.

Landowner's Evidence of Market Value in Eminent Domain Proceeding, 60 Am. Jur. Trials 447.

Condemnation of Leasehold Interests, 96 Am. Jur. Trials 211.

ALR. — Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated — state takings, 49 ALR5th 769.

CHAPTER 1

GENERAL PROVISIONS

JUDICIAL DECISIONS

Cited in Fountain v. Metropolitan Atlanta Rapid Transit Auth., 179 Ga. App. 318, 346 S.E.2d 363 (1986).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Eminent Domain: Lessee's Recovery of Compensation for Taking of Leasehold Interest, 56 POF3d 419.

Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, 71 POF3d 97.

ALR. — Zoning regulations limiting use of property near airport as taking of property, 18 ALR4th 542.

Inverse condemnation state court class actions, 49 ALR4th 618.

22-1-1. Definitions.

As used in this title, the term:

(1) "Blighted property," "blighted," or "blight" means any urbanized or developed property which:

(A) Presents two or more of the following conditions:

(i) Uninhabitable, unsafe, or abandoned structures;

(ii) Inadequate provisions for ventilation, light, air, or sanitation;

(iii) An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, this division shall not apply to property unless the relevant public agency has given notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;

(iv) A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasability study;

(v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or

(vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation; and

(B) Is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.

Property shall not be deemed blighted because of esthetic conditions.

(2) "Common carrier" means any carrier required by law to convey passengers or freight without refusal if the approved fare or charge is paid.

(3) "Condemnor" or "condemning authority" means:

(A) The State of Georgia or any branch or any department, board, commission, agency, or authority of the executive branch of the government of the State of Georgia;

(B) Any county or municipality of the State of Georgia;

(C) Any housing authority with approval of the governing authority of the city or county as provided in Code Section 8-3-31.1;

(D) Any other political subdivision of the State of Georgia which possesses the power of eminent domain; and

(E) All public utilities that possess the right or power of eminent domain.

(4) "Economic development" means any economic activity to increase tax revenue, tax base, or employment or improve general economic health, when the activity does not result in:

(A) Transfer of land to public ownership;

(B) Transfer of property to a private entity that is a public utility;

(C) Lease of property to private entities that occupy an incidental area within a public project; or

(D) The remedy of blight.

(5) "Each person with a legal claim" means the owner of the property or of any remainder, reversion, mortgage, lease, security deed, or other claim in the property.

(6) "Interest" means any title or nontitle interest other than fee simple title.

(7) "Persons" means individuals, partnerships, associations, and corporations, domestic or foreign.

(8) "Property" means fee simple title.

(9)(A) "Public use" means:

(i) The possession, occupation, or use of the land by the general public or by state or local governmental entities;

(ii) The use of land for the creation or functioning of public utilities;

(iii) The opening of roads, the construction of defenses, or the providing of channels of trade or travel;

(iv) The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;

(v) The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or

(vi) The remedy of blight.

(B) The public benefit of economic development shall not constitute a public use.

(10) "Public utility" means any publicly, privately, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, power, electricity, light, heat, gas, oil products, water, steam, clay, waste, storm water not connected with highway drainage, and other similar services and commodities, including publicly owned fire and police and traffic signals and street lighting systems, which directly or indirectly serve the public. This term also means a person, municipal corporation, county, state agency, or public authority which owns or manages a utility as defined in this paragraph. This term shall also include common carriers and railroads. (Ga. L. 1929, p. 219, § 3; Code 1933, § 36-201; Ga. L. 2006, p. 39, § 3/HB 1313.)

The 2006 amendment, effective April 4, 2006, redesignated former paragraphs (1) through (3) as present paragraphs (6) through (8), respectively, and added paragraphs (1) through (5), (9), and (10). For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey

article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

An easement was a compensable property interest in a condemnation action. Lee v. City of Atlanta, 219 Ga. App. 264, 464 S.E.2d 879 (1995).

Bad faith standard properly applied. — Trial court did not err in upholding a special master's decision granting a county's petition to condemn a property owner's land because the trial court properly concluded that the special master's application of the bad faith standard was appropriate; the trial court found that even if the special master had applied the abuse or misuse of discretion standard, no evidence of record supported such a finding on the part of the county. Brunswick Landing, LLC v. Glynn County, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

22-1-2. Nature of right of eminent domain; property to be put to public use.

(a) The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good. Thus, in time of war or insurrection the proper authorities may possess and hold any part of the territory of the state for the common safety. Notwithstanding any other provisions of law, neither this state nor any political subdivision thereof nor any other condemning authority shall use eminent domain unless it is for public use. Public use is a matter of law to be determined by the court and the condemnor bears the burden of proof.

(b) All condemnations shall not be converted to any use other than a public use for 20 years from the initial condemnation.

(c)(1) If property acquired through the power of eminent domain from an owner fails to be put to a public use within five years, the former property owner may apply to the condemnor or its successor or assign for reconveyance or quitclaim of the property to the former property owner or for additional compensation for such property. For purposes of this subsection, property shall be considered to have been put to a public use at the point in time when substantial good faith effort has been expended on a project to put the property to public use, notwithstanding the fact that the project may not have been completed. The application shall be in writing, and the condemnor or its successor or assign shall act on the application within 60 days by:

(A) Executing a reconveyance or quitclaim of the property upon receipt of compensation not to exceed the amount of the compensation paid by the condemnor at the time of acquisition; or

(B) Paying additional compensation to the former owner of the property, such compensation to be calculated by subtracting the

price paid by the condemnor for the property at the time of acquisition from the fair market value of the property at the time the application is filed.

(2) If the condemnor fails to take either action within 60 days, the former property owner may, within the next 90 days following, initiate an action in the superior court in the county in which the property is located to reacquire the property or receive additional compensation.

(3) The condemnor shall provide notice to each former owner of the property prior to acquisition if the condemnor fails to put such property to a public use within five years. The condemnee shall have one year from the date notice is received to bring an application under this subsection.

(d) In the case that property is acquired from more than one owner for the same public use and reconveyance or additional compensation to a single owner is impracticable, any party to the original condemnation or each person with a legal claim in such condemnation may file an action in the superior court in the county in which the property is located for an equitable resolution.

(e) This Code section shall not apply to condemnations subject to Code Section 22-3-162 or Title 32. (Orig. Code 1863, § 2201; Code 1868, § 2196; Code 1873, § 2222; Code 1882, § 2222; Civil Code 1895, § 3052; Civil Code 1910, § 3624; Code 1933, § 36-101; Ga. L. 2006, p. 39, § 4/HB 1313.)

The 2006 amendment, effective April 4, 2006, designated the previously existing provisions of this Code section as subsection (a); in subsection (a), deleted "; and in time of peace the General Assembly may authorize the appropriation of the same to public purposes, such as the opening of roads, construction of defenses, or providing channels for trade or travel" from the end of the second sentence, and added the last two sentences; and added subsections (b) through (d). For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

JUDICIAL DECISIONS

A taking for redevelopment is a taking for a public purpose. Nations v. Downtown Dev. Auth., 225 Ga. 324, 338 S.E.2d 240 (1985).

Cessation of work on project after notifying property owner of possible condemnation. — Where the Department of Transportation informed a corpo-

ration in the spring of 1981 that a building leased by it would be condemned for highway purposes, but later all work on the proposed highway, including all condemnation actions in progress, was halted, and the corporation sought to recover from the department its loss of an advantageous leasehold interest, as well as expenses involved in moving, since the corporation had been advised that no move was required before September 1982, and that written notification would precede a required removal, its decision to move in August 1982 was by voluntary choice, and could not be attributed to an interference by the department with its exclusive rights of ownership, use and enjoyment. Hence, whether the corporation's action was characterized as direct or inverse condemnation, the losses claimed did not result from an exercise of eminent domain. Josh Cabaret, Inc. v. DOT, 256 Ga. 749, 353 S.E.2d 346 (1987).

Cited in Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n, 257 Ga. 217, 356 S.E.2d 865 (1987).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, 71 POF3d 97.

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

Eminent domain: Public taking of sports or entertainment franchise or organization as taking for public purpose, 30 ALR4th 1226.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property, 62 ALR4th 1183.

Validity of extraterritorial condemnation by municipality, 44 ALR6th 259.

22-1-3. Power of General Assembly to determine when right of eminent domain may be exercised; duty of courts as to laws authorizing the condemnation of private property for private uses.

JUDICIAL DECISIONS

Cited in DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

22-1-4. Manner in which General Assembly may exercise right of eminent domain.

JUDICIAL DECISIONS

Cited in Banks v. Georgia Power Co., 267 Ga. 602, 481 S.E.2d 200 (1997).

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

Eminent domain: measure and elements of damages or compensation for condemnation of public transportation system, 35 ALR4th 1263.

22-1-5. Requirement of just compensation as a limitation on exercise of power of eminent domain.

JUDICIAL DECISIONS

Compensation must be paid before property is taken.

Payment of just and adequate compensation to the owner must always precede the taking of property for public use. City of Atlanta v. Wright, 159 Ga. App. 809, 285 S.E.2d 250 (1981).

Taking includes interference with rights incident to property.

In a condemnation case, an arbitrator properly found that the condemnor who refused to assist the owner of the condemned land in relocating its plant located on the condemned land, was responsible for the owner's failure to relocate the plant. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Because the cost of relocating a plant located on the condemned land exceeded the plant's value, as awarded by an arbitrator, the plant's owner could not be charged with failing to mitigate its damages by not relocating. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

In an eminent domain proceeding, the condemning authority could not object to an arbitrator's consideration of the cost of relocating a plant located on the condemned land because the authority made the cost of relocation a relevant issue by claiming the owner breached its duty to mitigate damages by not relocating the plant. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Recovery of business losses.

In a condemnation case, the fact that the owner of the condemned land had ceased the operation of a rendering plant located on the land by the time of trial, did not preclude the recovery of business loss damages. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Award of business loss damages was proper for the condemnation of land on which a rendering plant was located because the loss was not speculative: the plant was established, and plants engaged in the rendering business, were not generally bought and sold on the open market, making it unique. Carroll County Water Auth. v. L.J.S. Grease & Tallow, Inc., 274 Ga. App. 353, 617 S.E.2d 612 (2005).

Cessation of work on project after notifying property owner of possible condemnation. — Where the Department of Transportation informed a corporation in the spring of 1981 that a building leased by it would be condemned for highway purposes, but later all work on the proposed highway, including all condemnation actions in progress, was halted, and the corporation sought to recover from the department its loss of an advantageous leasehold interest, as well as expenses involved in moving, since the corporation had been advised that no move was required before September 1982, and that written notification would precede a required removal, its decision to move in August 1982, was by voluntary choice, and could not be attributed to an interference by the department with its exclusive rights of ownership, use and enjoyment. Hence, whether the corporation's action was characterized as direct or inverse condemnation, the losses claimed did not

result from an exercise of eminent domain. Josh Cabaret, Inc. v. DOT, 256 Ga. 749, 353 S.E.2d 346 (1987).

Cited in Simmons v. DOT, 225 Ga. App. 572, 484 S.E.2d 332 (1997).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 91.

ALR. — Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 ALR4th 337.

Measure of damages or compensation in eminent domain as affected by premises being restricted to particular educational, religious, charitable or noncommercial use, 29 ALR5th 36.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 ALR6th 205.

22-1-6. Right of persons to take or damage private property upon payment of just and adequate compensation.

JUDICIAL DECISIONS

Cited in Multitex Corp. of Am. v. Dickinson, 683 F.2d 1325 (11th Cir. 1982).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 91.

ALR. — Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

Solar energy: landowner's rights against interference with sunlight desired for purposes of solar energy, 29 ALR4th 349.

22-1-8. Exclusive nature of title.

JUDICIAL DECISIONS

Cited in DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

22-1-9. Policies and practices guiding exercise of eminent domain.

In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for property owners, and to promote public confidence in land acquisition practices, all condemnations and potential condemnations shall, to the greatest extent practicable, be guided by the following policies and practices:

(1) The condemning authority shall make every reasonable effort to acquire expeditiously real property by negotiation;

(2) Where the condemning authority seeks to obtain a fee simple interest in real property, real property shall be appraised before the initiation of negotiations, and the owner or his or her designated representatives shall be given an opportunity to accompany the appraiser during his or her inspection of the property, except that the condemning authority may, by law, rule, regulation, or ordinance, prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value;

(3) Before the initiation of negotiations for fee simple interest for real property, the condemning authority shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the condemning authority's independent appraisal of the fair market value of such property. The condemning authority shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. The condemning authority shall consider alternative sites suggested by the owner of the property as of the compensation offered;

(4) No owner shall be required to surrender possession of real property before the condemning authority pays the agreed purchase price or deposits with the court in accordance with this title, for the benefit of the owner, an amount not less than the condemning authority's appraisal of the fair market value of such property or the amount of the award of compensation in the condemnation proceeding for such property;

(5) The construction or development of a project for public use shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling or to move his or her business or farm operation without at least 90 days' written notice from the condemning authority of the date by which such move is required;

(6) If the condemning authority permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the condemning authority on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier;

(7) In no event shall the condemnor act in bad faith in order to compel an agreement on the price to be paid for the property;

(8) If any legal interest in real property is to be acquired by exercise of the power of eminent domain, the condemning authority

shall institute formal condemnation proceedings. No condemnor shall intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his or her real property; and

(9) A person whose real property is being acquired in accordance with this title may, after the person has been fully informed of his or her right to receive just compensation for such property, donate such property, any part thereof, any legal interest therein, or any compensation paid to a condemning authority, as such person shall determine. (Code 1981, § 22-1-9, enacted by Ga. L. 2006, p. 39, § 5/HB 1313; Ga. L. 2013, p. 141, § 22/HB 79.)

Effective date. — This Code section became effective April 4, 2006.

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, in paragraph (3), revised punctuation in the first sentence and substituted "it established" for "he or she established" in the third sentence.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

22-1-10. Duties of condemnor prior to exercise of eminent domain; rights of condemnee; exceptions.

(a) Prior to exercising the power of eminent domain, a governmental condemnor shall:

(1) Not less than 15 days before any meeting at which a resolution approving the exercise of eminent domain is to be considered, post a sign, if possible, in the right of way adjacent to each property that is subject to the proposed use of the eminent domain power stating the time, date, and place of such meeting;

(2) Attempt to serve the condemnee personally with notice of the meeting not less than 15 days before any meeting at which such resolution is to be considered, unless service is acknowledged or waived by the condemnee. If the attempted service is unsuccessful, service of notice may be satisfied by mail or statutory overnight delivery to the property owner at the address of record and, if different from the property owner, to the parties in possession of the property, return receipt requested;

(3) Ensure that any notice that is required by law to be published be placed in the county legal organ, but such notice shall not be published in the legal notices section of such newspaper; and

(4) Ensure that any meeting at which such resolution is to be considered and voted on shall commence after 6:00 P.M.

Any such resolution shall specifically and conspicuously delineate each parcel to be affected.

(b) A nongovernmental condemnor shall, with respect to its exercise of the power of eminent domain in general, by action of the governing body or chief executive officer of the condemnor designate who is authorized to approve the exercise of the power of eminent domain by the condemnor and provide a method for documenting the time of the exercise of final approval of a particular exercise of the power of eminent domain by that individual or group of individuals. Such a condemning authority shall with respect to any particular exercise of the power of eminent domain:

(1) Not less than 15 days before the documented time of approval of the exercise of eminent domain, post a sign, if possible, in the right of way adjacent to each property that is subject to the proposed use of the eminent domain power stating: (A) that the property is subject to a proposed condemnation which may be initiated after 15 days from the date of posting; (B) the date of posting; and (C) the name, business address, and telephone number of the condemnor;

(2) Not less than 15 days before the documented time of approval of the exercise of eminent domain serve the condemnee personally with notice of the proposed condemnation stating: (A) that the property is subject to a proposed condemnation which may be initiated after 15 days from the date of service; (B) the date of service; and (C) the name, business address, and telephone number of the condemnor. If the attempted service is unsuccessful, service of notice may be satisfied by mail or statutory overnight delivery to the property owner at the address of record and, if different from the property owner, to the parties in possession of the property, return receipt requested; and

(3) Provide the condemnee with an opportunity to meet with the individual or group of individuals having the power of documented approval or a representative of such individual or individuals.

(c) The condemnee may in writing waive any rights of the condemnee under this Code section.

(d) Any notice required to be personally served or mailed under this Code section shall be accompanied by a written statement of the rights that the condemnee possesses including but not limited to the right to notice, damages, hearing, and appeal of any award entered by the special master as described in this title. The written statement of rights shall also include the right to bring a motion pursuant to Code Section

22-1-11 as well as a sample motion. The Department of Community Affairs shall promulgate written notice of rights forms that shall be used for purposes of this subsection. The Department of Community Affairs shall promulgate different notice forms for each of the types of condemnation proceedings authorized by law. This subsection shall not become effective until the Department of Community Affairs has promulgated the written notice of rights forms contemplated under this subsection and such forms shall be promulgated no later than January 1, 2007.

(e) This Code section shall not apply to condemnations for the purposes of constructing or expanding one or more electric transmission lines, to condemnations pursuant to Code Section 46-8-121, or to any condemnations under Title 32. (Code 1981, § 22-1-10, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.)

Effective date. — This Code section became effective April 4, 2006, except that subsection (d) becomes effective by its own terms not later than January 1, 2007.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Resolution valid. — Trial court did not err in authorizing a county to condemn a property owner's land, which was located in a city because the county was not required to show the city's consent as a precondition to condemnation, and the resolution, which authorized the use of eminent domain, referred to and incorporated an attachment to the resolution, an exhibit that specifically delineated each parcel that the county sought to condemn. Brunswick Landing, LLC v. Glynn County, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

22-1-10.1. Time for bringing condemnation action; exceptions.

(a) Except as provided in subsections (b) and (c) of this Code section, no action for condemnation may be brought in any court of this state until at least 30 days after the date of the resolution or documented approval described in Code Section 22-1-10.

(b) If an emergency condition exists requiring the acquisition of property for the protection of the public health and safety, the condemnor may declare the existence of an emergency and adopt a resolution defining the emergency. Notice and hearing as required by Code Section 22-1-10 may be waived by the condemning body in an emergency condition.

(c) This Code section shall not apply to the acquisition or condemnation of property where consent is received from each person with a legal claim that has been identified or found. (Code 1981, § 22-1-10.1, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.)

Effective date. — This Code section became effective April 4, 2006.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

22-1-11. Determination of authority to exercise public domain.

Before the vesting of title in the condemnor and upon motion of the condemnee, or within ten days of the entry of the special master's award by entry of exception to the case, the court shall determine whether the exercise of the power of eminent domain is for a public use and whether the condemning authority has the legal authority to exercise the power of eminent domain and may stay other proceedings of the condemnation pending the decision of the court. The condemning authority shall bear the burden of proof by the evidence presented that the condemnation is for a public use as defined in Code Section 22-1-1. Nothing in this Code section shall be construed to require the condemnee to seek or obtain a special master's award prior to a hearing or decision by the court under this Code section. (Code 1981, § 22-1-11, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.)

Effective date. — This Code section became effective April 4, 2006.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Dismissal of action as nonjusticiable upheld. — Because city had yet to file a condemnation action against a landowner, landowner's suit seeking a public use determination under O.C.G.A. § 22-1-11 was properly dismissed, as it failed to present a justiciable controversy, and the city's mere inchoate intention to do so, if at all, did not give rise to a justiciable cause of action; moreover, if the appeals court construed this section to be applicable before the initiation of a condemnation action, the court would render meaningless the phrase "before the vesting of title in the condemnor," because that clarification would be redundant. Fox

v. City of Cumming, 289 Ga. App. 803, 658 S.E.2d 408 (2008).

Property owner's interpretation was not lacking in justification. — Property owner's interpretation of O.C.G.A. § 22-1-11 was not so devoid of a justiciable issue or so lacking in substantial justification that it could not be reasonably believed that a court would accept that interpretation, such that an award of attorney fees against the owner pursuant to O.C.G.A. § 9-15-14(a) and (b) could not stand. Fox v. City of Cumming, 298 Ga. App. 134, 679 S.E.2d 365 (2009).

22-1-12. Reimbursement to property owner of reasonable costs and expenses associated with condemnation proceedings.

In all actions where a condemning authority exercises the power of eminent domain, the court having jurisdiction of a proceeding instituted by a condemnor to acquire real property by condemnation shall award the owner of any right or title to or interest in such real property such sum as will in the opinion of the court reimburse such owner for his or her reasonable costs and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if:

(1) The final judgment is that the condemning authority cannot acquire the real property by condemnation; or

(2) The proceeding is abandoned by the condemning authority. (Code 1981, § 22-1-12, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.)

Effective date. — This Code section became effective April 4, 2006.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For annual survey on real property law, see 61 Mercer L. Rev. 301 (2009).

22-1-13. Compensation to condemnee for relocation damages and expenses.

In addition to the types of relocation damages permissible under law, any condemnee that is displaced as a result of the condemnation shall be entitled to:

(1) Actual reasonable expenses in moving himself or herself, his or her family, business, farm operation, or other personal property within a reasonable distance from the property condemned;

(2) Actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation;

(3) Such other relocation expenses as authorized by law; and

(4) With the consent of the condemnee, the condemnor may provide alternative site property as full or partial compensation. (Code 1981, § 22-1-13, enacted by Ga. L. 2006, p. 39, § 5/HB 1313.)

Effective date. — This Code section became effective April 4, 2006.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

22-1-14. Valuation of condemned property.

(a) When property is condemned under this title or any other title of this Code, the value of the condemned property may be determined through lay or expert testimony and its admissibility shall be addressed to the sound discretion of the court.

(b) If any party to a condemnation proceeding seeks to introduce expert testimony as to the issue of just and adequate compensation, Code Section 24-7-702 shall not apply. (Code 1981, § 22-1-14, enacted by Ga. L. 2006, p. 39, § 5/HB 1313; Ga. L. 2011, p. 99, § 38/HB 24.)

Effective date. — This Code section became effective April 4, 2006.

The 2011 amendment, effective January 1, 2013, substituted "Code Section 24-7-702" for "Code Section 24-9-67.1" near the end of subsection (b). See editor's note for applicability.

Cross references. — Expert opinion testimony in civil actions, § 24-7-702.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

Law reviews. — For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006). For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For article, "Evidence," see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

JUDICIAL DECISIONS

Lay witness opinion inadmissible on cost to build bridge. — Trial court did not abuse the court's discretion in excluding, for insufficient foundation, a witness's opinion testimony concerning the cost to build a bridge over a waterway

to cure trusts' lost usage after the condemnation of a ford over the waterway because the proffer the trusts made did not demonstrate pursuant to O.C.G.A. § 24-9-66 a basis upon which the witness could have formed the witness's own opinion on the cost to build the bridge apart from the single estimate the witness received; the trusts did not proffer that the witness obtained any other estimates concerning the cost to construct the bridge, spoke to anyone else about that cost, or possessed or sought to obtain any other information about that cost or about the accuracy of the estimate the witness had received. Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

Cited in Mason v. Home Depot U.S.A., Inc., 283 Ga. 271, 658 S.E.2d 603 (2008).

CHAPTER 2

CONDEMNATION PROCEDURE GENERALLY

Article 1

Proceeding Before Assessors

Part 2

Notice of Condemnation

Part 3

Selection and Oath of Assessors

Part 5

Appeals and Final Judgment

Article 2

Proceeding Before Special Master

JUDICIAL DECISIONS

The Department of Transportation may not condemn municipally owned property as the legislature has not clearly granted such authority or created a procedure therefore, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn "private property." DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Condemnation for transportation purposes. — Even though the title to property to be condemned for transportation purposes was not in question, a city could choose to use procedures set forth in this section and, although it could have done so, was not required to use the procedures set forth in this chapter. Back v. City of Warner Robins, 217 Ga. App. 326, 457 S.E.2d 582 (1995).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Eminent Domain: Lessee's Recovery of Compensation for Taking of Leasehold Interest, 56 POF3d 419.

Eminent Domain: Proof of Lack of Reasonable Necessity for Taking of Property, 71 POF3d 97.

ALR. — Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold, 17 ALR4th 337.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain, 21 ALR4th 765.

Validity, construction, and effect of statute or lease provision expressly governing rights and compensation of lessee upon condemnation of leased property, 22 ALR5th 327.

ARTICLE 1

PROCEEDING BEFORE ASSESSORS

JUDICIAL DECISIONS

"Property" for purposes of this article is limited to "private property" as indicated by the original enacting Act (Ga. L. 1894, p. 95) and by operation of § 22-1-8. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

If public authority does not proceed directly to condemn, injured citizen has right to compensation under the state Constitution. A cause of action for "inverse condemnation" will lie. Powell v. Ledbetter Bros., 251 Ga. 649, 307 S.E.2d 663 (1983).

PART 1

GENERAL PROVISIONS

Law reviews. — For article, "Liabilities of the Former Officer or Director," see 18 Ga. St. B.J. 150 (1982). For article, "Condemning Local Government Condemnation," see 39 Mercer L. Rev. 11 (1987).

22-2-1. "Condemnor" defined.

JUDICIAL DECISIONS

Railroads as condemnors. — See Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n, 257 Ga. 217, 356 S.E.2d 865 (1987).

RESEARCH REFERENCES

ALR. — Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.A.) in condemnation proceedings by United States, 164 ALR Fed. 341.

PART 2

NOTICE OF CONDEMNATION

22-2-20. Persons entitled to receive notice generally.

JUDICIAL DECISIONS

"Property" for purposes of this article is limited to "private property" as indicated by the original enacting Act (Ga. L. 1894, p. 95) and by operation of § 22-1-8. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Relief for owners of remainder interest not made parties to condemnation proceeding. — Owners of remainder interest in property who were not made parties to an in rem proceeding to condemn that property for a public purpose could obtain monetary relief for the value of their remainder but could not set aside the judgment of condemnation awarding title to a public body. Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

Lessee entitled to notice. — Lessee of property which was subjected to a partial taking was entitled to notice from the condemnor, not the lessor. Sims v. Foss, 201 Ga. App. 345, 411 S.E.2d 59 (1991).

22-2-21. Direction of notice where owner a minor or under disability; appointment of guardian ad litem.

(a) If the owner of the property or of any interest therein is a minor or under any disability whatsoever, notice of condemnation shall be served upon his or her guardian.

(b) If there is no guardian, notice shall be served personally on the minor and on the judge of the probate court of the county where the property or interest is located. The judge shall thereupon appoint a guardian ad litem to represent the minor in the litigation.

(c) If the judge of the probate court is disqualified, by reason of interest or other cause, notice shall be served on the clerk of the superior court of the county where the property or interest is located, who shall appoint a guardian ad litem to represent the minor. (Ga. L. 1894, p. 95, §§ 5-7; Civil Code 1895, §§ 4661, 4662, 4663; Civil Code 1910, §§ 5210, 5211, 5212; Code 1933, §§ 36-305, 36-306, 36-307; Ga. L. 2004, p. 161, § 4.1.)

The 2004 amendment, effective July 1, 2005, substituted "or her guardian" for "personal representative" at the end of subsection (a) and substituted "guardian" for "personal representative" at the beginning of the first sentence of subsection (b).

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

JUDICIAL DECISIONS

Relief for owners of remainder interest not made parties to condemnation proceeding. — Owners of remainder interest in property who were not made parties to an in rem proceeding to condemn that property for a public purpose could obtain monetary relief for the value of their remaindermant but could not set aside the judgment of condemnation awarding title to a public body. Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

22-2-23. Direction of notice where owner or guardian a nonresident; representation by judge of the probate court of nonresident owners and others whose addresses are unknown.

If the owner of the property or of any interest therein or the guardian of any owner resides out of the state, notice shall be served on the person in possession of the property or interest. Notice shall also be served on the nonresident owner or owners or the nonresident guardian as provided in Code Section 32-3-9. If the address of the owner or owners or of the guardian is not known, the judge of the probate court of the county where the property or interest is located shall act for such nonresident owners in the manner provided for unrepresented minors in Code Section 22-2-21. (Ga. L. 1894, p. 95, § 9; Civil Code 1895, § 4665; Civil Code 1910, § 5214; Code 1933, § 36-309; Ga. L. 2004, p. 161, § 4.2.)

The 2004 amendment, effective July 1, 2005, substituted "guardian" for "personal representative" three times throughout this Code section.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

Part 3

Selection and Oath of Assessors

22-2-40. Selection of assessors generally; authority.

(a) The condemnor and the condemnee shall each select an assessor, and the two assessors so selected shall select a third assessor. No person shall be selected as an assessor unless such person is a real estate appraiser who has an appraiser classification of certified general appraiser granted under Chapter 39A of Title 43, the "Real Estate Appraiser and Classification Act." The condemnor shall be liable for the costs of the assessor selected by or for the condemnor, the condemnee shall be liable for the costs of the assessor selected by or for the condemnee, and the costs of the assessor selected by the other assessors

or by the judge shall be split equally between the condemnor and condemnee. The combined total costs of all three assessors shall not exceed $500.00 per day.

(b) The assessors selected as provided in subsection (a) of this Code section shall have no authority to decide questions of law including, but not limited to, issues of compensability.

(c) The assessors selected as provided in subsection (a) of this Code section shall have the authority to refer questions of law to the appropriate superior court prior to entering an award. Neither party shall be prohibited from appealing a question of law to the superior court after the entry of the assessor's award. (Ga. L. 1894, p. 95, § 15; Civil Code 1895, § 4671; Civil Code 1910, § 5220; Code 1933, § 36-402; Ga. L. 1998, p. 1539, § 1.)

The 1998 amendment, effective July 1, 1998, designated the existing provisions as subsection (a), and added the second through fourth sentences; and added subsections (b) and (c).

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

Part 4

Hearing

22-2-62. Evidence to be heard by assessors generally.

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in Smith v. DeKalb County, 184 Ga. App. 628, 362 S.E.2d 435 (1987).

Value of Property Taken

1. In General

Consideration of zoning changes. — In determining value, jury may consider existing zoning and possible or probable future zoning changes which are sufficiently likely to have appreciable influence upon present market value. McDaniel Enters., Inc. v. Gwinnett County, 162 Ga. App. 419, 291 S.E.2d 738 (1982).

Privacy of land factor in fair market value. — Privacy afforded by location of realty, like a mountaintop, riverfront or oceanfront location, can also be a factor in determining market value of such realty. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

A panoramic or scenic view afforded by certain realty is an element to be included in assessing value. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Evidence held inadmissible to show value of condemnee's property.

Trial court erred in allowing testimony of the residential property's value in condemnation proceeding since the testimony provided speculative valuations based on the property's use as a commercial property at the time of the taking. Ga. Transmission Corp. v. Barron, 255 Ga. App. 645, 566 S.E.2d 363 (2002).

Evidence of factors which owner would present to prospective buyer properly admitted. — In determining market value of land taken or damaged in an eminent domain proceeding, it is proper for the trial court to admit proof of all factors which an owner could reasonably urge upon a prospective purchaser which could tend to favorably influence the person. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Evidence of property's highest and best use as convenience store properly admitted. — Trial court did not err in denying motion to strike the testimony of condemnee's expert witness that the condemned property's highest and best use would be as a convenience store because of the property's location in relation to nearby industry and residential development, where the testimony was based on relevant facts concerning existing local population and industry. DOT v. Kanavage, 183 Ga. App. 143, 358 S.E.2d 464 (1987).

Instructions. — Although charge restricting jury, in determining value of property, to uses which may be lawfully made of it at time of taking as set out in zoning ordinances then in effect was incorrect, there was no harm since the condemned property was zoned for industrial use at the time of taking and appellant contended that the property's highest and best use was industrial. McDaniel Enters., Inc. v. Gwinnett County, 162 Ga. App. 419, 291 S.E.2d 738 (1982).

Instruction that the mere possibility that land might be used for a certain purpose is not enough to authorize a jury to consider the effect of such a possibility in determining the value of land. At least a reasonable probability must be shown by competent evidence to authorize consideration of such a prospective use in determining value. Elliott v. Henry County Water & Sewerage Auth., 238 Ga. App. 15, 517 S.E.2d 545 (1999).

2. Value for All Purposes

Charge on theory of reasonable probable use in a condemnation proceeding was erroneous because it allowed the jury to determine the value of the land on the date of the taking without ascribing any value to subterranean limestone deposits. Gunn v. DOT, 222 Ga. App. 684, 476 S.E.2d 46 (1996).

Failure to give instructions, etc.

There being evidence from which the jury would be authorized to conclude that the property in question has reasonable potential for a use other than for that to which it is presently being put, it is error to refuse to give the following written request to charge: "In the estimation of value of land taken for public uses, it is not restricted to its agricultural or productive qualities, but inquiry may be made as to all other legitimate purposes to which the property could be appropriated. The test in such cases is whether the land could be used for other purposes, not whether the land would be used for other purposes." DOT v. Katz, 169 Ga. App. 310, 312 S.E.2d 635 (1983).

3. Unique Property

"Unique property" defined. — Unique property is simply property which must be valued by something other than the fair market value standard because there is no general market for such property. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Private riverfront land not unique. — Neither "privacy," which is inherent in ownership of all property, nor the fact that the condemned land was "riverfront" property, would authorize a charge on the condemned property having a value "pe-

Value of Property Taken (Cont'd)
3. Unique Property (Cont'd)

culiar" to the owner, or that the realty was "unique." Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 355, 299 S.E.2d 592 (1983).

Whether land taken or damaged in an eminent domain proceeding is unique or peculiar is a jury question. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Recovery of business losses.

The damages sustained by a business are separate and apart from the damages sustained by the real estate on which it is located. Old S. Bottle Shop, Inc. v. Department of Transp., 175 Ga. App. 295, 333 S.E.2d 127 (1985).

4. Comparable Sales and Offers of Purchase

Judicial determination of similarity required.

Generally, evidence of sales of property similar to that in question made at or near the time of the taking is competent evidence and may be considered to throw light on the issue of the value of the property sought to be condemned; however, the determination as to whether or not the witness testified as to comparable properties similar to that in question is within the sound discretion of the trial judge. Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 278 S.E.2d 429 (1981).

Sales of land to condemning authorities are inadmissible as evidence in condemnation proceedings on issue of value of land sought to be condemned. Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 278 S.E.2d 429 (1981).

Prospective and Consequential Damages

Evidence admissible as to effect of condemnation on landowner's business. — In action for value of property taken by the Department of Transportation, evidence which was admissible to reflect how the condemnation had adversely affected landowner's business had probative value and was admissible for consideration by the jury. DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981).

RESEARCH REFERENCES

ALR. — Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 ALR4th 1202.

Unaccepted offer for purchase of real property as evidence of value, 25 ALR4th 571.

Unaccepted offer to sell or buy comparable real property as evidence of value of property in issue, 25 ALR4th 615.

Eminent domain: compensability of loss of view from owner's property — state cases, 25 ALR4th 671.

Unaccepted offer to sell or listing of real property as evidence of its value, 25 ALR4th 983.

Eminent domain: compensability of loss of visibility of owner's property, 7 ALR5th 113.

22-2-63. Manner of assessment.

JUDICIAL DECISIONS

Analysis

General Consideration

Damage construed. — The word "damaged," has a broader meaning than the word "taken," and is designed to impose liability on a condemnor for consequential injuries to property which would not otherwise exist. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Just and adequate compensation. — In an eminent domain proceeding, the "just and adequate compensation" due a condemnee is "the value" of the land taken, plus any consequential damages to the remainder if there is a partial taking, which may not be less than "the actual value" of the property taken or damaged. Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 348, 299 S.E.2d 594 (1983).

Failure to instruct on definition of "consequential damages". — Where the court's jury charge never defined the term "consequential damages" and was vague in charging the method of determining consequential damages, the charge was too vague and that part of the judgment awarding consequential damages was overruled. DOT v. Clower, 170 Ga. App. 750, 318 S.E.2d 161 (1984).

Cited in DOT v. Willis, 165 Ga. App. 271, 299 S.E.2d 82 (1983); Smith v. DeKalb County, 184 Ga. App. 628, 362 S.E.2d 435 (1987).

Value of Property Taken

Pro rata valuation in partial taking not authorized. — Charge to jury which employed a pro rata method of assessing the value of a partial taking was erroneous; statutes which govern the manner of assessment and set out the factors considered in determining compensation do not express such a relational mode. Bland v. Bulloch County, 205 Ga. App. 317, 422 S.E.2d 223, cert. denied, 205 Ga. App. 899, 422 S.E.2d 223 (1992).

Recovery of business losses. — The damages sustained by a business are separate and apart from the damages sustained by the real estate on which it is located. Old S. Bottle Shop, Inc. v. Department of Transp., 175 Ga. App. 295, 333 S.E.2d 127 (1985).

Prospective and Consequential Damages

Instruction held reversible error. — Instructing the jury that it could reduce the amount of consequential damages to the remainder of the property by the amount of special consequential benefits was reversible error, where there was no evidence from which the jury could have formed a reasonable estimate of the amount or value of such benefits. Perry v. Department of Transp., 193 Ga. App. 254, 387 S.E.2d 445 (1989).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 91.

ALR. — Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 ALR4th 1202.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 ALR4th 308.

22-2-65. Filing and recording of award.

RESEARCH REFERENCES

ALR. — Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 ALR4th 889.

PART 5

APPEALS AND FINAL JUDGMENT

22-2-80. Appeal to jury in superior court — Generally.

JUDICIAL DECISIONS

Time for appealing assessor's award. — Since the Board of Assessors did not file and record their award, apparently on the belief that the parties had decided on their own what the just compensation was for the condemnor obtaining the right of way, the 10-day time period for filing an appeal to a jury from the time the award was filed never arose and the condemnee was not barred from filing an appeal to a jury. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

Judge's duty, etc.

In accord with bound volume. See Nodvin v. DeKalb County, 158 Ga. App. 819, 282 S.E.2d 410 (1981).

Cited in Martha K. Wayt Trust v. City of Cumming, 306 Ga. App. 790, 702 S.E.2d 915 (2010).

22-2-81. Appeal to jury in superior court — Effect of appeal on condemnor's right to use condemned property or interest; payment, tender, or deposit of award as condition on condemnor's right to use property or interest.

JUDICIAL DECISIONS

Cited in Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

22-2-82. Appeal to jury in superior court — Effect of tender, payment, or acceptance of assessors' award on right of appeal; effect of discrepancy between award and final judgment.

JUDICIAL DECISIONS

Payment of amount of jury verdict is condition precedent to appeal. — Under the mandate of the Constitution, that private property cannot be taken or damaged for public use without first paying just and adequate compensation to the owner, the payment of the amount of a jury verdict in excess of the prior appraisal by assessors, or special master, is a condition precedent to a valid appeal from such verdict and the judgment based thereon. City of Atlanta v. Wright, 159 Ga. App. 809, 285 S.E.2d 250 (1981).

Tender of award did not impact right to jury. — Although the condemnor tendered compensation into the trial court's registry that appeared to represent the sum the condemnor and condemnee had agreed was sufficient compensation, the tender of the award did not affect the condemnee's right to appeal to a jury. Morrison v. Derdziak, 255 Ga. App. 89, 564 S.E.2d 500 (2002).

Cited in Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981); Georgia Dep't of Transp. v. Woodard, 254 Ga.

587, 331 S.E.2d 557 (1985).

22-2-83. Issuance of execution on award or judgment.

JUDICIAL DECISIONS

Cited in Georgia Dep't of Transp. v. Woodard, 254 Ga. 587, 331 S.E.2d 557 (1985).

22-2-84. Entry of notice and award on minutes of court; payment of costs.

In all cases, the clerk shall enter the notice and award thereon upon the minutes of the court, and the condemnor shall pay:

(1) The assessors' costs as provided in Code Section 22-2-40; and

(2) Other costs as provided by law in civil cases in the superior court.

The condemnee shall pay the assessors' costs as provided in Code Section 22-2-40. (Ga. L. 1894, p. 95, § 26; Civil Code 1895, § 4682; Civil Code 1910, § 5232; Code 1933, § 36-605; Ga. L. 1949, p. 1404, § 1; Ga. L. 1955, p. 651, §§ 1, 2; Ga. L. 1992, p. 1688, § 1; Ga. L. 1998, p. 1539, § 2.)

The 1992 amendment, effective July 1, 1992, in subsection (b), substituted "500,000 or more according to the United States decennial census of 1990 or any future such census" for "300,000 or more according to the present or any future United States census".

The 1998 amendment, effective July 1, 1998, rewrote this Code section.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

22-2-84.1. Appeals to superior court from assessor's award; reasonable expenses; liability of costs relating to issues of law.

Repealed by Ga. L. 2006, p. 39, § 6/HB 1313, effective April 4, 2006.

Editor's notes. — This Code section was based on Code 1981, § 22-2-84.1, enacted by Ga. L. 1998, p. 1539, § 2.

22-2-85. Extent of interest obtainable by condemnor upon condemnation.

Law reviews. — For annual survey of zoning and land use law, see 57 Mercer L. Rev. 447 (2005). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Use of condemned property.

A power company that acquired an electric transmission line easement by condemnation in 1985 had not permanently ceased using the land under O.C.G.A. § 22-2-85; thus, the landowner from whom the land was acquired was not entitled to recover possession of the land. Although the company had not constructed a line across the property, the company maintained the property and planned to construct the line in question after 2010 and before 2020 to meet increased power demands. William E. Honey Bus. Interest, LLLP v. Ga. Power Co., 291 Ga. App. 44, 661 S.E.2d 203 (2008), cert. denied, No. S08C1408, 2008 Ga. LEXIS 678 (Ga. 2008).

Applicability. — Since the original condemnor acquired part of a 50-foot easement by grant and part by condemnation, O.C.G.A. § 22-2-85 was inapplicable in a condemnation action brought by the condemnor's licensee to change the use of the easement from a petroleum pipeline to a fiber optic communications system; even if O.C.G.A. § 22-2-85 were applicable, it was not shown that the condemnor had ceased using the pipeline for the purpose of conducting its business. Witcher v. Level 3 Communs., LLC, 272 Ga. App. 611, 612 S.E.2d 816 (2005).

Condemned property reverts to owner if purpose permanently ceases.

When a street railway condemned land for a trolley, it acquired an easement, not fee simple title. Therefore, the railway's interest reverted to the owner, her heirs and assigns, when the land was no longer used as a trolley line. Cobb County v. Crew, 267 Ga. 525, 481 S.E.2d 806 (1997).

Cited in Georgia Dep't of Transp. v. Woodard, 254 Ga. 587, 331 S.E.2d 557 (1985).

ARTICLE 2

PROCEEDING BEFORE SPECIAL MASTER

Law reviews. — For article, "Condemning Local Government Condemnation," see 39 Mercer L. Rev. 11 (1987).

JUDICIAL DECISIONS

Article does not violate state Constitution.

Condemnee is not deprived of due process and equal protection of the laws under this article. Collins v. Metropolitan Atlanta Rapid Transit Auth., 163 Ga. App. 168, 291 S.E.2d 742 (1982).

This article provides cumulative, etc.

The 1967 amendment to this article should be construed as evidencing legislative intent that special master proceeding be considered a "supplementary" and "cumulative" form of condemnation in all cases wherein condemnor otherwise possesses power of eminent domain. Mallory v. Upson County Bd. of Educ., 163 Ga. App. 377, 294 S.E.2d 599 (1982).

Condemnor chooses its method, etc.

If the condemnor elects to use the Special Master Law, then it is bound by the provisions of law following its own election. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

Amendment of petition for condemnation. — Petition for condemnation under this article can be amended by condemnor to make a more specific description of right of way to be condemned. Dorsey v. DOT, 248 Ga. 34, 279 S.E.2d 707 (1981).

Proceeding by county board of education. — Superior court did not err in holding that condemnor county board of

education was authorized to proceed under this article in exercising power of eminent domain. Mallory v. Upson County Bd. of Educ., 163 Ga. App. 377, 294 S.E.2d 599 (1982).

Cited in Craven v. Georgia Power Co., 248 Ga. 79, 281 S.E.2d 568 (1981); Dougherty County v. Burt, 168 Ga. App. 166, 308 S.E.2d 395 (1983).

22-2-100. "Condemning body" and "condemnor" defined.

As used in this article, "condemning body" or "condemnor" means:

(1) The State of Georgia or any branch or any department, board, commission, agency, or authority of the executive branch of the government of the State of Georgia;

(2) Any county or municipality of the State of Georgia;

(3) Any housing authority with approval of the governing authority of the city or county as provided in Code Section 8-3-31.1;

(4) Any other political subdivision of the State of Georgia which possesses the power of eminent domain; and

(5) All public utilities that possess the right or power of eminent domain. (Ga. L. 1957, p. 387, § 1; Ga. L. 1962, p. 461, § 1; Ga. L. 1967, p. 825, § 1; Ga. L. 2006, p. 39, § 7/HB 1313.)

The 2006 amendment, effective April 4, 2006, inserted "or any department, board, commission, agency, or authority of the executive branch" in paragraph (1); added "with approval of the governing authority of the city or county as provided in Code Section 8-3-31.1" at the end of paragraph (3); substituted "possesses" for "is vested with" near the end of paragraph (4); and substituted "All public utilities that possess" for "All other persons possessing" at the beginning of paragraph (5). For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

JUDICIAL DECISIONS

Actions to condemn sewer easements are properly brought under this article. Threatt v. Fulton County, 266 Ga. 466, 467 S.E.2d 546 (1996).

Railroads as condemnors. — See Central of Ga. R.R. v. Georgia Pub. Serv. Comm'n, 257 Ga. 217, 356 S.E.2d 865 (1987).

Contract rights after condemnation. — County water and sewer authority could charge a developer tap fees after the authority acquired, by condemnation under O.C.G.A. § 22-2-100 et seq., the developer's contract with a private company which allowed termination at will; another provider's condemned contracts did not allow for termination, and thus, a rational basis existed under the Fourteenth Amendment for treating the developer differently. Highland Props. v. Lee

County Utils. Auth., No. 1:00-CV-198-2(WLS), 2005 U.S. Dist. LEXIS 36015 (M.D. Ga. Sept. 30, 2005).

Challenge to special masters award. — Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with notice that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Condemnation of a property owner's land by a city was upheld on appeal, as was the trial court's judgment entered upon a jury verdict in the amount of $63,361 for the property and an award of attorney fees to the city, because the property owner never challenged the valuation made by a special master and also removed the amount awarded from the registry, thereby estopping the owner from challenging the legality of the taking on appeal. Mayo v. City of Stockbridge, 285 Ga. App. 58, 646 S.E.2d 79 (2007), cert. denied, No. S07C1279, 2007 Ga. LEXIS 707 (Ga. 2007).

Cited in Herron v. Metropolitan Atlanta Rapid Transit Auth., 177 Ga. App. 201, 338 S.E.2d 777 (1985); Stafford v. Bryan County Bd. of Educ., 212 Ga. App. 6, 440 S.E.2d 774 (1994); Clary v. City of Stockbridge, 300 Ga. App. 623, 686 S.E.2d 288 (2009).

22-2-101. Effect of article on other methods of condemnation; intent of article.

JUDICIAL DECISIONS

Condemnee not allowed to raise issue of right of condemnor to take property for first time on appeal. — The special master method of condemnation is intended to be an expeditious method of arriving at the just and adequate compensation to be paid a citizen before his interest in property may be condemned; allowing a condemnee to raise, for the first time on appeal from the special master's award, the right of the condemnor to take the property sought to be condemned, would obstruct this purpose. Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Cited in Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817 (1988); Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996).

22-2-102. Filing of petition of condemnation; order for parties to appear before special master, make known their rights or interests, and other matters; time of hearing before special master; directions for notice and service thereof; attachment of process to petition; cause to proceed in rem.

(a) In addition to the requirements set forth in Chapter 1 of this title, whenever it is desirable, for any reason, to arrive at a quick and certain determination of the compensation to be paid first to the condemnee for the taking or damaging of private property, the condemnor shall:

(1) File a petition in a superior court having jurisdiction for a judgment in rem against the property or interest therein, as provided in Code Section 22-2-130; and

(2) At or before the filing of the petition, present a copy of the petition to a judge of the superior court of the county wherein the property or interest sought to be condemned is located. Thereupon, unless waived by the parties the judge shall have a hearing in court, in chambers, or by telephone with the parties not less than ten days nor more than 30 days from the filing of the petition to appoint a special master. After such hearing, the judge shall make an order requiring the condemnor, the person in possession of the property or interest, and each person with a legal claim or interest to appear at a hearing before a special master at a time and place specified in the order and to make known their rights, if any, in and to the property or interest sought to be condemned, their claims as to the value of the property or interest, and any other matters material to their respective rights.

(b) The hearing before the special master shall take place not less than 30 days nor more than 60 days after the date of the entry of the order appointing the special master.

(c) The order shall give such directions for notice and the service thereof as are appropriate and as are consistent with this article, in such manner as to provide most effectively an opportunity to all parties at interest to be heard. In condemnations for purposes of constructing or expanding one or more electric transmission lines, in addition to service of the order, a copy of the order shall be mailed by certified mail or sent by statutory overnight delivery to any person shown by the public ad valorem tax records of the county in which the property is located to have an interest in the property and to any other person having open and obvious possession of the property. It shall not be necessary to attach any other process to the petition except the order so made, and the cause shall proceed as in rem. (Ga. L. 1957, p. 387, § 5; Ga. L. 2004, p. 568, § 1; Ga. L. 2006, p. 39, § 8/HB 1313.)

The 2004 amendment, effective July 1, 2004, substituted "Except in condemnations for purposes of constructing or expanding one or more electric transmission lines, the" for "The" at the beginning of the fourth sentence, and added the fifth and seventh sentences.

The 2006 amendment, effective April 4, 2006, substituted the present provisions of this Code section for the former provisions, which read: "Whenever it is desirable, for any reason, to arrive at a quick and certain determination of the compensation to be paid first to the condemnee for the taking or damaging of private property, the condemnor shall file a petition in a superior court having jurisdiction for a judgment in rem against the property or interest therein, as provided in Code Section 22-2-130. At or before the filing of the petition, the condemnor shall present a copy of the petition to a judge of the superior court of the county wherein the property or interest sought to be condemned is located. Thereupon, the judge shall make an order requiring the condemnor, the person in possession of the property or interest, and any other person known to have any rights in the property or interest to appear at a hearing before a special master at a time and place specified in the order and to make known their rights, if any, in and to the property or interest sought to be condemned, their

claims as to the value of the property or interest, and any other matters material to their respective rights. Except in condemnations for purposes of constructing or expanding one or more electric transmission lines, the hearing before the special master shall take place not less than ten days nor more than 15 days after the date of service of the order. In condemnations for purposes of constructing or expanding one or more electric transmission lines, the hearing before the special master shall take place not less than 30 days and not more than 40 days after the date of service of the order. The order shall give such directions for notice and the service thereof as are appropriate and as are consistent with this article, in such manner as to provide most effectively an opportunity to all parties at interest to be heard. In condemnations for purposes of constructing or expanding one or more electric transmission lines, in addition to service of the order, a copy of the order shall be mailed by certified mail to any person shown by the public ad valorem tax records of the county in which the property is located to have an interest in the property and to any other person having open and obvious possession of the property. It shall not be necessary to attach any other process to the petition except the order so made, and the cause shall proceed as in rem." For applicability, see editor's note.

Editor's notes. — Ga. L. 2004, p. 568, § 3, not codified by the General Assembly, provides that the amendment to this Code section: "shall apply to the exercise of eminent domain to acquire easements or other property interests for which land acquisition negotiations for purposes of constructing or expanding one or more electric transmission lines begin on or after such date. The provisions of this Act relating to additional compensation, reconveyance, and quitclaim shall apply to easements and other property interests acquired on or after July 1, 2004, through the exercise of eminent domain."

Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2004 amendment of this Code section, see 21 Ga. St. U.L. Rev. 157 (2004). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

JUDICIAL DECISIONS

Government property not "private property." — "Private property" does not include property owned by a government or a governmental entity. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

The Department of Transportation may not condemn municipally owned property as the legislature has not clearly granted such authority or created a procedure therefore, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn "private property." DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Noncompliance with notice requirement. — Condemnation hearing before a special master held less than ten days after the condemnee was served with the order was void for violation of the requirements of this section. Black v. Fayette County, 265 Ga. 175, 453 S.E.2d 692 (1995).

Condemnee bound by decision to use special master. — Having chosen and agreed to use the special master proceeding, a condemnee is bound by the applicable law regarding the special master's proceeding. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Objections or exceptions must be specific. Litigants have a responsibility to make their timely objections or exceptions to the award of the special master in specific rather than in generalized form.

Beck v. Cobb County, 180 Ga. App. 808, 350 S.E.2d 818 (1986).

Failure to file exceptions constitutes waiver. — The failure of a party to file exceptions to the master's award for determination by the superior court results in a waiver of the party's right to further litigate any nonvalue issues. Beck v. Cobb County, 180 Ga. App. 808, 350 S.E.2d 818 (1986).

Cited in Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981); Stephens v. Department of Transp., 170 Ga. App. 784, 318 S.E.2d 167 (1984); McBroom v. Georgia Power Co., 192 Ga. App. 81, 383 S.E.2d 634 (1989); Styers v. Atlanta Gas Light Co., 263 Ga. 856, 439 S.E.2d 640 (1994); Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

22-2-102.1. Petitioning superior court for judgment in rem.

In addition to the requirements set forth in Code Section 22-1-10, whenever it shall be necessary for such condemning body to take or damage private property, or any interest or easement therein, in pursuance of any law so authorizing, for any public use, and where, by reason of the necessities of the public needs, of which the condemning body shall be the exclusive judge, and it shall be desirable for these reasons to have a quick and effective adjudication of the just and adequate compensation to be paid the owner or owners of such property before taking the same, and it shall be desirable to have a judicial ascertainment and judicial supervision of all questions and proceedings connected with the matter, such condemning body may, through any authorized representative, petition the superior court of the county having jurisdiction, for a judgment in rem against said property, or any easement or other interest in said property, condemning the same in fee simple to the use of the petitioner upon payment of just and adequate compensation therefor. (Ga. L. 1957, p. 387, § 3; Code 1981, § 22-2-102.1, enacted by Ga. L. 1983, p. 3, § 16.1; Ga. L. 2006, p. 39, § 9/HB 1313.)

Effective date. — This Code section became effective January 25, 1983.

The 2006 amendment, effective April 4, 2006, substituted "In addition to the requirements set forth in Code Section 22-1-10, whenever" for "Whenever" at the beginning; and substituted "for any public use" for "for any public purpose". For applicability, see editor's note.

Editor's notes. — The provisions of this Code section were previously enacted in substantially similar form by Ga. L. 1957, p. 387, § 3. However, those provisions were not enacted as part of the original Code by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

For note, "Standards of Judicial Review of Condemnation Proceedings Under Georgia's Special Master's Act," see 20 Ga. St. B.J. 82 (1983).

JUDICIAL DECISIONS

Authority of special master. — The provision in this Code section that "the condemning body shall be the exclusive judge" of the public need does not give the condemning authority an absolute right of taking based upon its own determination of necessity. The special master has the authority to hear and determine any legal objection to the taking. Central of Ga. Elec. Membership Corp. v. Mills, 196 Ga. App. 882, 397 S.E.2d 137 (1990).

Application of presumption limited. — The presumption that the right to condemn for a valid public purpose, absent a finding of its bad faith, applies only to a finding that a condemnation is necessary under O.C.G.A. § 22-2-102.1. City of Stockbridge v. Meeks, 283 Ga. App. 343, 641 S.E.2d 584 (2007).

Condemnor is the exclusive judge of necessity in condemnation for public purposes. — Under Georgia law, the condemnor is the exclusive judge of necessity in the condemnation of private property for public purposes. Mosteller Mill, Ltd. v. Ga. Power Co., 271 Ga. App. 287, 609 S.E.2d 211 (2005).

Ordinance infringing on utility's eminent domain power. — Forsyth County, Ga., Unified Development Code §§ 21-6.1 and 21-6.5, were defective because they required a utility to successfully comply with the ordinance's procedures, and authorized the county to deny "any or all" portions of an application; as such, they were unconstitutional infringements on the utility's legislatively-delegated power of eminent domain. Forsyth County v. Ga. Transmission Corp., 280 Ga. 664, 632 S.E.2d 101 (2006).

Cited in Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996); Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997).

22-2-102.2. Contents of petition.

The petition referred to in Code Section 22-2-102.1 shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interest to be taken or damaged;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

(5) A statement setting forth the necessity to condemn the private property and describing the public use for which the condemnor seeks the property; and

(6) Such other facts as are necessary for a full understanding of the cause. (Ga. L. 1957, p. 387, § 4; Code 1981, § 22-2-102.2, enacted by Ga. L. 1983, p. 3, § 16.1; Ga. L. 2006, p. 39, § 10/HB 1313.)

Effective date. — This Code section became effective January 25, 1983.

The 2006 amendment, effective April 4, 2006, deleted "and" from the end of paragraph (4); added paragraph (5); and redesignated former paragraph (5) as paragraph (6). For applicability, see editor's note.

Editor's notes. — The provisions of this Code section were previously enacted in substantially similar form by Ga. L. 1957, p. 387, § 4. However, those provi-

sions were not enacted as part of the original Code by the Code enactment Act (Ga. L. 1981, Ex. Sess., p. 8).

Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on real property law, see 59 Mercer L. Rev. 371 (2007). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

Right to condemn. — Condemnation petitions of a municipal airport commission that failed to show the consent of the city to such actions should have been dismissed for failing to state a claim upon which relief could be granted. Lopez-Aponte v. Columbus Airport Comm'n, 221 Ga. App. 840, 473 S.E.2d 196 (1996).

County was authorized to exercise the county's right of eminent domain in connection with the expansion of a detention center because the county had jurisdiction over the maintenance of jails in the county under O.C.G.A. § 36-9-5(a), and the operation of a jail constituted a public purpose pursuant to Ga. Const. 1983, Art. IX, Sec. II, Para. V; the property owner did not identify any general law limiting the right of the county to exercise the county's power of eminent domain. Brunswick Landing, LLC v. Glynn County, 301 Ga. App. 288, 687 S.E.2d 271 (2009), cert. denied, No. S10C0558, 2010 Ga. LEXIS 246 (Ga. 2010).

Petition must sufficiently describe the property to be condemned. — Condemnor did not identify the land with sufficient specificity to convey a "danger tree maintenance" easement where the condemnor described a "transmission line" easement, but did not describe the land it wished to condemn to maintain the transmission lines. Mosteller Mill, Ltd. v. Ga. Power Co., 271 Ga. App. 287, 609 S.E.2d 211 (2005).

Petition must plead public use. — Given that a city's condemnation petition failed to plead a proposed taking for public use in compliance with O.C.G.A. § 22-2-102.2(1) and (5), a trial court did not err by dismissing the city's condemnation petition. City of Stockbridge v. Meeks, 283 Ga. App. 343, 641 S.E.2d 584 (2007).

22-2-103. Appointment of special master — Generally.

The special master provided for in this article shall be appointed by the judge or judges of the superior courts of each judicial circuit and shall discharge the duties provided for in this article. Nothing contained in this article shall be construed as limiting the number of special masters for the circuit, and any judge of the superior court may appoint a special master for any particular case or cases. The special master so appointed must be a competent attorney at law, be of good standing in his profession, and have at least three years' experience in the practice of law. His relation and accountability to the court shall be that of an auditor or master in the general practice existing in this state. He shall hold office at the pleasure of the judge and shall be removable at any time with or without cause. Each special master shall take and file in the office of the clerk of the superior court of the county in which the property or interest to be condemned is situated, along

with the order of his appointment, an oath or affidavit substantially in the form prescribed in Code Section 22-2-105. (Ga. L. 1957, p. 387, § 6; Ga. L. 1984, p. 682, § 1.)

The 1984 amendment, effective July 1, 1984, substituted "in which the property or interest to be condemned is situated" for "of his residence" in the last sentence.

Law reviews. — For article, "The New Special Master Rule — Uniform Superior Court Rule 46: Life Jackets for the Courts in the Perfect Storm," see 15 (No. 4) Ga. St. B.J. 20 (2009).

JUDICIAL DECISIONS

Challenge to special masters award. — Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with notice that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Recommittal of the action to a new special master was proper, where the trial court found that the special master failed to apply the Georgia law relating to condemnation proceedings and found the award of the special master to be "incomplete" based on the failure of the special master to determine the just and adequate compensation of the property or interest taken. McBroom v. Georgia Power Co., 192 Ga. App. 81, 383 S.E.2d 634 (1989).

22-2-104. Appointment of special master — Form to be used in appointing special master.

Substantially, the following form should be used in appointing a special master:

> _____, a competent attorney at law, residing in the _____ Judicial Circuit, and of at least three years' experience in the practice of law, is hereby appointed a special master in and for the _____ Judicial Circuit, to discharge the duties of special master as provided in the condemnation law of this state. This appointment is _____ (either for general duties or for a particular case, as the case may be).
>
> This _____ day of _____, ____.
>
> _____
> Judge, Superior Court

(Ga. L. 1957, p. 387, § 7; Ga. L. 1999, p. 81, § 22.)

The 1999 amendment, effective April 5, 1999, part of an Act to revise, modernize, and correct the Code, deleted "19" from the date line in the form in this Code section.

22-2-105. Appointment of special master — Oath of special master.

The special master is required to take the following oath to be filed along with the order of his appointment in the office of the clerk of the superior court of the county in which the property or interest to be condemned is situated:

I, _____, do swear that I will faithfully, well, and truly perform the duties of special master under the condemnation law, according to law and to the best of my skill and ability.

_____

Sworn to and subscribed
before me this _____
day of _____, _____.

_____
(Title and authority
of attesting officer)

(Ga. L. 1957, p. 387, § 8; Ga. L. 1984, p. 682, § 2; Ga. L. 1999, p. 81, § 22.)

The 1984 amendment, effective July 1, 1984, substituted "in which the property or interest to be condemned is situated" for "of his residence" following "of the county."

The 1999 amendment, effective April 5, 1999, part of an Act to revise, modernize, and correct the Code, deleted "19" from the date line in the form in this Code section.

22-2-106. Compensation of special master; allowance by judge of reasonable time for special master to inspect premises.

(a) The compensation of the special master shall be provided for by a proper order of the judge of the superior court; shall be included in and made a part of the judgment of the court condemning the property or any interest therein sought to be taken, such judgment to be based on the award of the special master and shall be paid by the condemning body. Such compensation shall be left to the discretion of the court and shall not exceed a reasonable hourly rate consistent with local standards unless otherwise agreed upon by the parties with consent of the court. The compensation of the special master shall be assessed as court costs and shall be paid prior to the filing of any appeal from the judgment of the court; provided, however, that if such compensation has not been determined and assessed at the time of filing any such appeal, the same shall be paid within 30 days from the date of assessment.

(b) The judge may allow the special master a reasonable period of time for personal inspection of the premises and may compensate the

special master for his or her time spent inspecting the premises and for any actual expenses incurred by the special master in connection with the inspection, provided that the special master shall file an affidavit with the court showing his or her time spent in inspection and itemizing his or her expenses. (Ga. L. 1957, p. 387, § 9; Ga. L. 1975, p. 27, § 1; Ga. L. 1988, p. 408, § 2; Ga. L. 2006, p. 39, § 11/HB 1313.)

The 1988 amendment, effective July 1, 1988, added the last sentence of subsection (a).

The 2006 amendment, effective April 4, 2006, in subsection (a), in the first sentence, substituted "and" for a semicolon following "award of the special master", and deleted "; and shall not be less than $50.00 per day nor more than $250.00 per day for the time actually devoted to the hearing and consideration of the matter by the special master" at the end, and added the present second sentence; and in subsection (b), inserted "or her" following "his" in three places, and substituted "incurred by the special master" for "incurred by him" near the middle. For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

22-2-107. Service of process; award by special master and judgment of court conclusive as to right of condemnor to take or damage property or interest.

(a) Copies of the petition, together with the order of the court provided for in Code Section 22-2-102, shall in all cases be served upon the person in possession of the property or interest sought to be condemned and upon all persons who are known to have any rights in such property or interest.

(b) The return of service signed by the sheriff or his lawful deputy, or an affidavit of service executed by any citizen of this state, reciting that a copy of the petition and order was served upon the named condemnee in person or by leaving a copy at the place of his residence, shall be sufficient evidence as to the service of the named condemnee. It shall be the duty of the sheriff or citizen, as the case may be, to cause service to be made within three days from the date of the order of the judge on the petition.

(c) If any of the condemnees or other persons known to have any rights in the property or interest reside outside of the county, the judge shall order service to be made upon such party or parties. Such service shall be perfected by causing a copy of the petition and order to be served upon the party or parties by the sheriff or any lawful deputy of the county of the residence of the party or parties. In addition, service may be made by any citizen. The return of such sheriff or lawful deputy,

or the affidavit of such citizen that the party or parties were served, either in person or by leaving a copy of the petition and order at the residence, shall be conclusive as to service.

(d) The sheriff or any lawful deputy of the county where the petition is filed shall serve nonresidents of this state:

(1) By posting a copy of the petition, together with the order of the judge thereon, on the bulletin board at the courthouse door of the county in which the property or interest sought to be condemned is located for not less than five days prior to the time of the hearing before the special master;

(2) By the insertion of a notice identifying the property or interest sought to be condemned, as well as the date and place of the hearing before the special master, in a newspaper having general circulation in the county wherein such property or interest is located, for one issue of said paper, the date of which shall be not less than four nor more than seven days prior to the hearing before the special master, and which is the same newspaper in which the sheriff's advertisements are carried; and

(3) Where the address of such nonresidents is known, by mailing to them by registered or certified mail or statutory overnight delivery a copy of the petition and order.

(e) If any of the persons entitled to service under this Code section are minors, or insane persons, or persons otherwise laboring under disabilities, the guardian of such persons shall be served. If the guardian resides outside of the county or is a nonresident, he or she shall be served as provided in subsections (c) and (d) of this Code section. If such minor or other person laboring under disabilities has no guardian, service shall be perfected by serving the disabled person personally or, in the event the disabled person lives outside of the county or is a nonresident, by serving the disabled person by the method provided in subsections (c) and (d) of this Code section for other persons who live outside of the county or are nonresidents, and by serving the judge of the probate court of the county wherein such property or interest is located, who shall stand in the place of and protect the rights of the disabled person or appoint a guardian ad litem for such person.

(f) In the event of unknown persons or unborn remaindermen who are likely to have any rights in the property or interest or the proceeds thereof, the judge of the probate court of the county wherein such property or interest is located shall be served with a copy of the petition and order; and it shall be his duty to stand in the place and protect the rights of such unknown parties or unborn remaindermen.

(g) The purpose of this article being to quicken and simplify the condemnation proceeding in all cases where the public good requires it

and to provide for a condemnation in rem against the property or interest required to be taken or damaged and insofar as is reasonably possible to protect the rights of all parties to be heard at the time of the hearing before the special master, a substantial and reasonable effort to comply with the various modes of service provided for in this Code section shall be sufficient. Insofar as concerns the right of the condemning body to take or damage the property or any interest therein, upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive. (Ga. L. 1957, p. 387, § 10; Ga. L. 1966, p. 388, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 161, § 4.3.)

The 2000 amendment, effective July 1, 2000, and applicable with respect to notices delivered on or after July 1, 2000, substituted "certified mail or statutory overnight delivery" for "certified mail" in paragraph (3) of subsection (d).

The 2004 amendment, effective July 1, 2005, in subsection (e), deleted "or other personal representative" following "the guardian" in the first sentence, deleted "or personal representative" following "the guardian" and inserted "or she" between "he" and "shall" in the second sentence, and deleted "or personal representative" following "no guardian" in the third sentence.

Editor's notes. — Ga. L. 2004, p. 161, § 16, not codified by the General Assembly, provides that: "This Act shall become effective on July 1, 2005, and all appointments of guardians of the person or property made pursuant to former Title 29 shall continue in effect and shall thereafter be governed by the provisions of this Act."

Law reviews. — For annual survey on zoning and land use law, see 61 Mercer L. Rev. 427 (2009).

JUDICIAL DECISIONS

Participation in hearing waived objection to defect in service, etc.

In accord with Taylor v. Taylor County. See Black v. Fayette County, 268 Ga. 570, 492 S.E.2d 517 (1997).

Cited in Langley Land Co. v. Monroe County, 738 F. Supp. 1571 (M.D. Ga. 1990); Black v. Fayette County, 265 Ga. 175, 453 S.E.2d 692 (1995); Ware v. Henry County Water & Sewerage Auth., 258 Ga. App. 778, 575 S.E.2d 654 (2002).

22-2-108. Powers and duties of special master generally.

The special master appointed pursuant to Code Section 22-2-103 shall serve in lieu of a board of assessors; provided, however, that if two assessors are selected pursuant to Code Section 22-2-108.1, the special master shall serve as the chairperson of the special master panel and shall decide all issues other than value issues which arise at the hearing provided for in Code Section 22-2-102. The special master's duties and authority, except as otherwise provided for in this article, shall be the same as provided by Code Sections 22-2-61 through 22-2-63. The special master shall hold the hearing provided for in Code Section 22-2-102 at the time and place provided by the order of the judge of the superior court and in compliance with the duties and

authority conferred by this article. The special master shall not be authorized to continue or delay the hearing, except as otherwise provided by Code Section 22-2-108.1, relating to granting of a recess for selection of assessors, or by Code Section 9-10-150, relating to granting continuances by reason of membership in the General Assembly during sessions thereof, or except upon the written order of the judge of the superior court; and such a continuance shall be granted only for good cause shown to that judge. When it shall be necessary for the judge to grant a continuance, the continuance shall be for not more than five days from the date of the order granting the continuance. (Ga. L. 1957, p. 387, § 11; Ga. L. 1973, p. 479, § 1; Ga. L. 1998, p. 1539, § 3.)

The 1998 amendment, effective July 1, 1998, in the first sentence, inserted "appointed pursuant to Code Section 22-2-103" and substituted the proviso for "and his"; added "The special master's" at the beginning of the present second sentence; and inserted "by Code Section 22-2-108.1, relating to granting of a recess for selection of assessors, or" in the fourth sentence.

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998).

JUDICIAL DECISIONS

Condemnee bound by decision to use special master. — Having chosen and agreed to use the special master proceeding, a condemnee is bound by the applicable law regarding the special master's proceeding. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Duty of special master, etc.

In accord with first paragraph in bound volume. See Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Issues to be resolved by special master.

Legal objections raised by parties may include, for example, the right of the condemnor to condemn, the interest to be condemned, the nature of the interest taken and the effect of the condemnation upon the respective rights of the parties. Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Exceptions to findings of special master, etc.

When legal objections are raised before and passed upon by the special master, to obtain review of these objections exceptions must be taken to the master's findings prior to the superior court's entry of an order and judgment condemning the property. Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

When no exceptions are taken, etc.

In accord with bound volume. See Ward v. Housing Auth., 157 Ga. App. 825, 278 S.E.2d 715 (1981).

Continuance. — This Code section mandates that no continuance be granted in excess of five days and does not denominate one rule for condemnors and another rule for condemnees, so where the condemnor failed to abide by the clear language of the statutory method it elected to follow, and the record was clear that condemnees at no time acquiesced in or waived strict compliance with this Code section, the trial court erred by not declaring the hearing of the special master void for violation of this Code section. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

The language in this section restricting the duration of continuances benefits the condemning authority by expediting the condemnation process. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

Cited in Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981); Ga.

Transmission Corp. v. Barron, 255 Ga. App. 645, 566 S.E.2d 363 (2002).

22-2-108.1. Special master panel; selection; notice; powers and duties.

(a) At any time at least five calendar days before commencement of the hearing specified in the order of the judge of the superior court, the condemnee or any other person having a right or interest in the property may, by written notice served on the condemnor and all other parties to the proceeding, select an assessor to hear and decide value issues at the hearing. Within five days after receipt of such notice, the condemnor shall, by written notice served on the condemnee and all other parties to the proceeding, select an assessor to hear and decide value issues at the hearing. The provisions of Code Sections 22-2-40 and 22-2-41 shall apply to the selection of such assessors; provided, however, that the special master appointed pursuant to Code Section 22-2-103 shall serve as the third assessor, shall be compensated as provided for in Code Section 22-2-106, and shall continue to perform the duties set forth in Code Section 22-2-108. Notwithstanding the number of condemnees or any other persons having a right or interest in the property, only one assessor shall be selected on behalf of all such condemnees or interested parties.

(b) In the event that the notice selecting an assessor by the condemnee or other person having a right or interest in the property is not served on the condemnor more than five days before the time on which the hearing is to commence as specified in the order of the judge of the superior court, the special master shall convene the hearing at the time and place specified in the order; and if requested by the condemnor, the special master shall then recess the hearing to a date certain, but not more than five calendar days after such time, to allow the condemnor additional time to select an assessor.

(c) After the condemnee or other person having a right or interest in the property has selected an assessor and the condemnor has selected an assessor, the special master and the two assessors selected by the parties shall constitute the special master panel and, except as otherwise provided in this article, shall perform the duties provided by Code Sections 22-2-61 through 22-2-63. A majority of the special master panel shall decide all value issues which arise at the hearing provided for in Code Section 22-2-102 and shall prepare and submit the award as provided in Code Section 22-2-110. (Code 1981, § 22-2-108.1, enacted by Ga. L. 1998, p. 1539, § 3.)

Effective date. — This Code section became effective July 1, 1998.

Law reviews. — For review of 1998 legislation relating to eminent domain,

see 15 Ga. St. U.L. Rev. 115 (1998).

22-2-109. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement.

(a) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the special master nor the special master panel, in the event such a panel exists, nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be located. Said advertisement shall further show the date of the said original location of such highway as hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the Department of Transportation, and that any interested party may obtain a copy of same by writing to the Department of Transportation (One Georgia Center, 600 West Peachtree NW, Atlanta, Georgia 30308) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the special master or the special master panel, in the event such a panel exists, or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the

location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest taken for such public improvement. (Ga. L. 1966, p. 320, § 2; Ga. L. 1998, p. 1539, § 4; Ga. L. 2011, p. 752, § 22/HB 142.)

The 1998 amendment, effective July 1, 1998, in subsection (a), inserted "nor the special master panel, in the event such a panel exists," in the middle of the first sentence; and inserted "or the special master panel, in the event such a panel exists," near the beginning of the first sentence in subsection (c).

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted "(One Georgia Center, 600 West Peachtree NW, Atlanta, Georgia 30308)" for "(2 Capitol Square, Atlanta, Georgia 30334)" in the last sentence of subsection (b).

Law reviews. — For review of 1998 legislation relating to eminent domain, see 15 Ga. St. U.L. Rev. 115 (1998). For survey article on real property law, see 59 Mercer L. Rev. 371 (2007). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

Applicability. — It was error to hold that the date of taking property to acquire an easement for electrical transmission and distribution lines was the date of filing of the original condemnation petition; because the property was not being condemned for public street and road purposes, the date of taking was not governed by O.C.G.A. § 22-2-109, but by O.C.G.A. §§ 22-2-110 and 22-2-111, and thus the date of taking was when the amount provided in the award was paid into the trial court's registry. Orr v. Ga. Transmission Corp., 281 Ga. 754, 642 S.E.2d 809 (2007).

Land and its natural components.

The only relevant inquiry in an appeal from the amount awarded by the special master was the overall value of the property condemned pursuant to this Article, with the fact that the property contained "chewacla" soil being taken into account; the trial court did not err in excluding irrelevant testimony as to the separate value of the "chewacla" soil located on the property. Williams v. Mayor of Carrollton, 195 Ga. App. 590, 394 S.E.2d 389 (1990).

Remaining term of lease determined. — Where a lease provided that, for four additional five-year terms, tenants had the option of extending the lease, although rent for the renewal periods was not agreed to, the trial court correctly held that the tenants had only a nine month's tenancy remaining on the date of taking because the 20-year renewal provision was unenforceable for a lack of certainty as to the amount of rent for that renewal period. Cann v. Metropolitan Atlanta Rapid Transit Auth., 196 Ga. App. 495, 396 S.E.2d 515 (1990).

Market value of property a jury question. — Market value of property taken by the Department of Transportation is a matter of opinion, and may be established by direct as well as circumstantial evidence; it is peculiarly a matter for the jury, and the jury is not absolutely bound even by uncontradicted testimony of experts, but may consider the nature of the property involved, together with any other fact or circumstance properly within the knowledge of the jury which tends to establish the value of the property, and may arrive at a different figure than that of the experts, higher or lower, where the verdict reached is not so disparate as to justify an inference of gross mistake or undue bias. DOT v. Delta Mach. Prods. Co., 157 Ga. App. 423, 278 S.E.2d 73 (1981).

Pro rata valuation in partial taking not authorized. — Charge to jury which employed a pro rata method of assessing the value of a partial taking was erroneous; statutes which govern the manner of assessment and set out the factors considered in determining compensation do not express such a relational mode. Bland v. Bulloch County, 205 Ga. App. 317, 422 S.E.2d 223, cert. denied, 205 Ga. App. 899, 422 S.E.2d 223 (1992).

It was not error to fail to charge on consequential benefits where, although two witnesses mentioned consequential benefits, there was no evidence as to such benefits from which the jury could reasonably estimate the amount. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986).

Nonexpert opinion on value. — Where each of the nonexpert witnesses showed familiarity with the property in question, knowledge of sales in the vicinity, and consequently knowledge of land values in the community, the cross-examination revelation that there may have been a lack of understanding as to many factors involved in formally determining land value may have served to weaken and discredit the testimony but did not render it inadmissible or incompetent. City of Alma v. Morris, 180 Ga. App. 420, 349 S.E.2d 277 (1986).

Cited in Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 91.

ALR. — Assemblage or plottage as factor affecting value in eminent domain proceedings, 8 ALR4th 1202.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 ALR4th 308.

Abutting owner's right to damages for limitation of access caused by traffic regulation, 15 ALR5th 821.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 ALR6th 205.

22-2-110. Award of special master and special master panel — Time of filing; award to become part of record of proceedings; vesting of title in condemnor upon deposit of award into court; form of award; use in subsequent appeal.

(a) The award of the special master or the special master panel, in the event such a panel exists, shall be served in a manner consistent with Code Section 9-11-5 upon all the parties and filed with the clerk of the superior court of the county where the property or interest is situated within three days after the date on which such hearing is completed. The special master or the special master panel shall mail the award to the condemnor and any condemnees on the date of filing of the award and provide a certificate of service evidencing the mailing of such award.

(b) The award shall become a part of the record of the proceedings in said matter and shall condemn and vest title to the property or other interest in the condemning body upon the deposit by that body of the amount of the award into the registry of the court, subject to the

demand of such condemnee or condemnees, according to their respective interests.

(c) The award shall be in the following form:

AWARD

The special master appointed and chosen by the court to hear evidence and give full consideration to all matters touching upon the value of the property or interest sought to be condemned, as shown by the description of the property or interest in the case of _____ (condemning body) versus _____ (acres of land or other described interest in said land) and _____ (condemnee), Civil action file no.____ in superior court, having first taken the oath as required by law of the special master, the same having been filed with the clerk of the Superior Court of _____ County, and the special master panel, in the event such a panel exists, having heard evidence under oath and given consideration to the value of such property or interest on the _____ day of _____, at ____:____ __.M., as provided for in the order of the court, do decide and recommend to the court as follows:

(1) I/We find and award to _____, condemnee, the sum of $_____, as the actual market value of the property or interest sought to be condemned;

(2) I/We find consequential damages to the remaining property or interest in the amount of $_____;

(3) I/We find consequential benefits to the remaining property or interest in the amount of $_____ (never to exceed the amount of the consequential damages);

(4) I/We find and award to _____, condemnee, the sum of $_____, as the value of any associated moving costs;

(5) Balancing the consequential benefits against the consequential damages, I/we find and award to the condemnee in this case in the total sum of $_____, and I/we respectfully recommend to the court that the said property or interest be condemned by a judgment in rem to the use of the condemnor upon the payment of the last stated sum into the registry of the court, subject to the demands of the condemnee.

This _____ day of _____, ____.

_____
Special Master

_____
Assessor

_____
Assessor

(d) In any case where there is an appeal from the award of the special master or the special master panel, in the event such a panel exists, to a jury in the superior court, such award shall not be competent evidence. Any such appeal shall be a de novo investigation, and such award shall be detached from the papers in the case before the same are delivered to the jury. (Ga. L. 1957, p. 387, § 12; Ga. L. 1984, p. 682, § 3; Ga. L. 1998, p. 1539, § 5; Ga. L. 2006, p. 39, § 12/HB 1313.)

The 1984 amendment, effective July 1, 1984, deleted "which is the county of my residence," preceding "and having heard evidence" in subsection (c).

The 1998 amendment, effective July 1, 1998, in subsection (a), inserted "or the special master panel, in the event such a panel exists,", substituted "on which" for "of", and inserted "is completed" at the end; in subsection (c), deleted "OF SPECIAL MASTER" from the form heading, substituted "the" for "I, _____, the", inserted "the special master panel, in the event such a panel exists,", substituted "I/We" for "I" throughout the form, and added the signature lines for assessors; and rewrote subsection (d).

The 2006 amendment, effective April 4, 2006, in subsection (a), inserted "served in a manner consistent with Code Section 9-11-5 upon all the parties and" in the first sentence, and added the second sentence; and in the form titled "AWARD" in subsection (c), added paragraph (4), and redesignated former paragraph (4) as paragraph (5). For applicability, see editor's note.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1998, in the undesignated language in the form in subsection (c), "evidence and" was substituted for "evidence,", "and" was deleted following "in superior court," and a comma was added following "Superior Court of _____ County".

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Time of filing award. — Condemnation proceeding was not voided and nullified by the fact that special master's award was not filed with clerk of court within three days after date of hearing, since the requirement of speedy disposition to protect the property owner is directory rather than jurisdictional. Savage v. Thomaston-Upson County Office Bldg. Auth., 205 Ga. App. 634, 422 S.E.2d 896, cert. denied, 205 Ga. App. 901, 422 S.E.2d 896 (1992).

There is no provision in this Code section which tolls the filing period for an appeal in the event that the special master fails to file the awards within three days of the hearing. Garner v. Georgia Transmission Corp., 235 Ga. App. 889, 510 S.E.2d 624 (1999).

Date of taking. — It was error to hold that the date of taking property to acquire an easement for electrical transmission and distribution lines was the date of filing of the original condemnation petition; because the property was not being condemned for public street and road purposes, the date of taking was not governed by O.C.G.A. § 22-2-109, but by O.C.G.A. §§ 22-2-110 and 22-2-111, and thus the date of taking was when the amount pro-

vided in the award was paid into the trial court's registry. Orr v. Ga. Transmission Corp., 281 Ga. 754, 642 S.E.2d 809 (2007).

Title vests upon entry of condemnation judgment. — Because title to an owner's property vested in a city upon the entry of a condemnation judgment and the payment of the award to the owner in accordance with O.C.G.A. §§ 22-2-110(b) and 22-2-111, the city was without authority to unilaterally dismiss the condemnation action and demand return of the previously paid award. Gramm v. City of Stockbridge, 297 Ga. App. 165, 676 S.E.2d 818 (2009).

Non-value issues are not subject to de novo review under subsection (d) upon filing an appeal to a jury. Styers v. Atlanta Gas Light Co., 263 Ga. 856, 439 S.E.2d 640 (1994).

On appeal from a special master's award, the court was not required to conduct an evidentiary hearing on non-value issues because that would allow new evidence which was not before the special master or a repetition of evidence which should have been preserved by transcript. Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997), cert. denied, 522 U.S. 1110, 118 S. Ct. 1041, 140 L. Ed. 2d 106 (1998).

Interest under the special master proceeding is calculated from the date of the award, i.e., the time of the "taking." Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Cited in Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983); Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817 (1988); Langley Land Co. v. Monroe County, 738 F. Supp. 1571 (M.D. Ga. 1990); Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996); Threatt v. Forsyth County, 250 Ga. App. 838, 552 S.E.2d 123 (2001).

OPINIONS OF THE ATTORNEY GENERAL

Appeal costs. — Appellants contesting the award of a special master need not pay the advance court cost deposit set forth in §§ 9-15-4 and 15-6-77 if they have properly paid the required costs for filing the initial condemnation petition. 1985 Op. Att'y Gen. No. U85-17.

RESEARCH REFERENCES

ALR. — Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 ALR4th 889.

22-2-111. Award of special master or special master panel — Incorporation of award into judgment of court.

Upon the entry of the award of the special master or the special master panel, if such a panel exists, and the presentation of the award to the judge of the superior court, the judge shall enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor upon the condemnor's paying into the registry of the court the amount provided in the award. (Ga. L. 1957, p. 387, § 13; Ga. L. 1998, p. 1539, § 6.)

The 1998 amendment, effective July 1, 1998, inserted "or the special master panel, if such a panel exists," near the beginning, and deleted "of the special master" following "award" at the end.

Law reviews. — For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

No property taken until payment of award.

It was error to hold that the date of taking property to acquire an easement for electrical transmission and distribution lines was the date of filing of the original condemnation petition; because the property was not being condemned for public street and road purposes, the date of taking was not governed by O.C.G.A. § 22-2-109, but by O.C.G.A. §§ 22-2-110 and 22-2-111, and thus the date of taking was when the amount provided in the award was paid into the trial court's registry. Orr v. Ga. Transmission Corp., 281 Ga. 754, 642 S.E.2d 809 (2007).

Exceptions, etc.

In accord with bound volume. See Earth Mgt., Inc. v. Heard County, 248 Ga. 442, 283 S.E.2d 455 (1981); Wisenbaker v. Lowndes County, 175 Ga. App. 825, 335 S.E.2d 1 (1985).

Exceptions to amended award. — Section 22-2-112 does not set forth any exception to the ten-day period for appeal, and the right to file extended to exceptions taken to an amended award not substantively changing an original award. Stafford v. Bryan County Bd. of Educ., 267 Ga. 274, 476 S.E.2d 727 (1996).

Amendments not allowed after entry of judgment.

Upon payment of an award into the court and the entry of the judgment of condemnation, title to the property vested in the county under this section, and since an amendment to alter the quantum of the property taken is not permissible after title vests, the county could not correct its mistake that caused it to condemn the wrong property either by amendment or by dismissing its petition. Gatefield Corp. v. Gwinnett County, 234 Ga. App. 621, 507 S.E.2d 164 (1998).

Title vests upon entry of condemnation judgment. — Because title to an owner's property vested in a city upon the entry of a condemnation judgment and the payment of the award to the owner in accordance with O.C.G.A. §§ 22-2-110(b) and 22-2-111, the city was without authority to unilaterally dismiss the condemnation action and demand return of the previously paid award. Gramm v. City of Stockbridge, 297 Ga. App. 165, 676 S.E.2d 818 (2009).

22-2-112. Award of special master — Appeal of award generally; condemnee's right to jury trial on issue of just and adequate compensation.

(a) If the condemnor or any condemnee is dissatisfied with the amount of the award, an appeal shall be filed in the superior court and such appeal shall be filed within ten calendar days from the service of the award, plus three additional calendar days for mailing of the award. At the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property or interest taken or the amount of damage done, with the same right to move for a new trial and file an appeal as in other cases at law. The entering of an appeal and the proceedings thereon shall not hinder or delay in any way the condemnor's work or the progress thereof.

(b) The condemnee shall have the right to a jury trial on the issue of just and adequate compensation before the superior court having jurisdiction over the property sought to be condemned during the next term of court following the vesting of title in the condemnor. This right to a jury trial at the next term of court may be waived by the

condemnee. (Ga. L. 1957, p. 387, § 14; Ga. L. 1998, p. 1539, § 7; Ga. L. 2006, p. 39, § 13/HB 1313.)

The 1998 amendment, effective July 1, 1998, inserted "or she" near the beginning of the first sentence, and added the second sentence.

The 2006 amendment, effective April 4, 2006, designated the previously existing provisions of this Code section as subsection (a); in subsection (a), added the first sentence, and deleted the former first two sentences, which read: "In case any party is dissatisfied with the amount of the award, he or she may, within ten days after the award is filed, enter in writing an appeal from the award to the superior court of the county where the award is filed. The provisions of Code Section 22-2-84.1, relating to reasonable expenses incurred on appeal, shall apply to any appeal under this Code section."; and added subsection (b). For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006). For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

JUDICIAL DECISIONS

Appeal in superior court, etc.

In accord with first paragraph in bound volume. See Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

In accord with second paragraph in bound volume. See Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

The trial judge erred, where he determined that he was not going to conduct the proceedings de novo but instead decided to review the decision of the special master on nonvalue issues as though occupying an appellate position in the proceedings, thereby addressing only whether there was any evidence to support the special master's findings of fact and whether there were any errors of law in the special master's conclusions of law. Wrege v. Cobb County, 186 Ga. App. 512, 367 S.E.2d 817, cert. denied, 186 Ga. App. 919, 367 S.E.2d 817 (1988).

Payment of award not prerequisite to filing appeal. — Payment of the amount of the award of the special master into the registry of the court is not a prerequisite to filing an appeal for a jury trial. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Ten-day period also applies to nonvalue issues. — In order to comply with due process requirements, the 10 days in which to file exception to value issues under this section applies to nonvalue issues as well. Sims v. City of Toccoa, 256 Ga. 368, 349 S.E.2d 385 (1986).

Appeal to superior court not timely filed where condemnee fails to follow procedure for making objections known. — Where the condemnee fails to follow the procedure required by law in condemnation in rem proceedings before a special master in seeking to have his objections made known to the court and to the special master, the superior court may rule that the condemnee's appeal to the superior court from the award of the special master was not timely filed. Hendley v. Housing Auth., 160 Ga. App. 221, 286 S.E.2d 463 (1981).

No exception to ten-day period for appeal. — This Code section does not set forth any exception to the ten-day period,

and the right to file an appeal extended to exceptions taken to an amended award not substantively changing an original award. Stafford v. Bryan County Bd. of Educ., 267 Ga. 274, 476 S.E.2d 727 (1996).

Entry of judgment on award prior to expiration of ten-day period. — Because all conditions and limitations provided by the Special Master's Act must be strictly followed, a superior court's entry of judgment on an award prior to the expiration of the ten-day period is reversible error absent an acquiescence or waiver. Fowler v. City of Warm Springs, 238 Ga. App. 601, 519 S.E.2d 703 (1999).

Appeal to superior court is de novo proceeding.

An appeal by either party from the award of a special master pursuant to this section is a de novo proceeding. Accordingly, if the case is tried again and the jury reaches a verdict smaller than the prepaid special master's award, the payor would be entitled to a judgment against the payee for the difference. Chastain v. Fayette County, 221 Ga. App. 118, 470 S.E.2d 513 (1996).

Sole question on appeal, etc.

While all issues may be raised in an appeal from the special master's award, the question of value is the sole issue to be submitted to the jury, and its fact-finding powers are limited to those facts directly touching on value. Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

What this section and § 22-2-114 make very clear is that the court, and not the jury on appeal, will decide the quantity of interest of each condemnee and will also decide the quality of such interest. Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

Trial court properly denied condemnees' motion for jury trial "on all issues of law and fact" upon appeal from an award by a special master, where the sole jury question was the amount of the compensation award. Benton v. Georgia Marble Co., 258 Ga. 58, 365 S.E.2d 413 (1988).

Exceptions, etc.

Special master's findings as to amount company was entitled to under condemnation proceeding were determinations of law; therefore, a jury trial under this section was an inappropriate method of appealing, and the company's failure to take exception to the findings acted as a waiver of its right to appeal. Big-Bin Dispos-All, Inc. v. City of Valdosta, 172 Ga. App. 746, 324 S.E.2d 501 (1984).

The failure of a party to file exceptions to the master's award for determination by the superior court results in a waiver of the party's right to further litigate any nonvalue issues. Beck v. Cobb County, 180 Ga. App. 808, 350 S.E.2d 818 (1986).

Since the condemnor never filed an exception to the special master's award concerning the requirement that it give the landowner advance notice of its entry onto the easement in non-emergency situations, and the superior court made the special master's award the judgment of the court, the trial court was correct when it determined that the notice provision was a viable portion of the condemnation judgment. Styers v. Atlanta Gas Light Co., 263 Ga. 856, 439 S.E.2d 640 (1994).

Trial court properly refused to dismiss a landowner's appeal on grounds that it failed to express dissatisfaction with the compensation awarded by the special master, as it provided the utility with notice that the landowner was objecting to the valuation given on the property; moreover, in light of the interest that the utility acquired in the property, and the purposes for which it intended to use that property, consequential damages potentially represented a significant portion of the compensation the landowner could recover. Ga. Power Co. v. Stowers, 282 Ga. App. 695, 639 S.E.2d 605 (2006).

Condemnation of a property owner's land by a city was upheld on appeal, as was the trial court's judgment entered upon a jury verdict in the amount of $63,361 for the property and an award of attorney fees to the city, because the property owner never challenged the valuation made by a special master and also removed the amount awarded from the registry, thereby estopping the owner from challenging the legality of the taking on appeal. Mayo v. City of Stockbridge, 285 Ga. App. 58, 646 S.E.2d 79 (2007), cert. denied, No. S07C1279, 2007 Ga. LEXIS 707 (Ga. 2007).

Trial court erred in jury instructions. — In a business's appeal of a spe-

cial master's award of $5,000 for the loss of its business operation due to condemnation of the building it occupied and its challenge to a trial court judgment finding that it lacked a compensable business loss, that judgment was reversed because the trial court erred in its instruction to the jury on the uniqueness test by incorrectly stating that difficulty relocating the business in the same general area was not a test for uniqueness. Further, the trial court erred by instructing the jury not to consider evidence of the business's difficulty in relocating to a comparable site in the area. ABM Realty Co. v. Bd. of Regents, 296 Ga. App. 658, 675 S.E.2d 549 (2009).

Dismissal of appeal, etc.

In accord with 2d paragraph in bound volume. See Williams v. Macon-Bibb County Water & Sewerage Auth., 202 Ga. App. 549, 414 S.E.2d 909 (1992).

Where property owner's appeal to jury was untimely because it was not filed within ten days of the filing of the special master's award, his earlier demand for jury trial, filed before a special master award existed, did not qualify as a timely appeal to jury, and inasmuch as no appeal to jury was filed after the award was made and within ten days after the award was filed, the county's motion to dismiss the appeal was granted. Gwinnett County v. Grant, 181 Ga. App. 304, 352 S.E.2d 391 (1986).

The circumstances of a condemnation proceeding under the Special Master Act, O.C.G.A. § 22-2-112, prior to the 2006 amendment to that statute, include the fact that neither the special master nor the court are obligated to serve the parties with the award, and as a result a party has a duty to exercise diligence in determining when the award was filed; in such a situation, due diligence requires more than relying solely on a third party to provide information that could be obtained directly from the court. Rutland v. Ga. Power Co., 286 Ga. App. 14, 648 S.E.2d 436 (2007).

As written, O.C.G.A. § 22-2-112 sets forth no exceptions to the 10-day period to file an appeal from the date an award is filed with the superior court, and an appeal not filed within that 10-day period is not timely and the proper judgment is one of dismissal. Rutland v. Ga. Power Co., 286 Ga. App. 14, 648 S.E.2d 436 (2007).

Trial court serves as trier of fact on nonvalue issues. — There being no right to a jury trial on exceptions to the special master's rulings on nonvalue issues, the trial court sits as the trier of fact and its judgment will not be disturbed if there is any evidence in the record to sustain it. Metropolitan Atlanta Rapid Transit Auth. v. Central Parking Sys., 167 Ga. App. 649, 307 S.E.2d 93 (1983).

Evidentiary hearing not required. — On appeal from a special master's award, the court was not required to conduct an evidentiary hearing on non-value issues because that would allow new evidence which was not before the special master or a repetition of evidence which should have been preserved by transcript. Simmons v. Webster County, 225 Ga. App. 830, 485 S.E.2d 501 (1997), cert. denied, 522 U.S. 1110, 118 S. Ct. 1041, 140 L. Ed. 2d 106 (1998).

Cited in Oglethorpe Power Corp. v. Seasholtz, 157 Ga. App. 723, 278 S.E.2d 429 (1981); Turner v. City of Nashville, 167 Ga. App. 665, 307 S.E.2d 74 (1983); Metropolitan Atlanta Rapid Transit Auth. v. Gould Investors Trust, 169 Ga. App. 303, 312 S.E.2d 629 (1983).

22-2-113. Award of special master or special master panel — Effect of tender, payment, or acceptance of award on right of appeal; right of owners of separate and distinct parcels to file separate appeal; effect of discrepancy between award of special master and verdict of jury; issuance of execution upon award or judgment.

(a) The tender, payment, or acceptance of the amount of the award shall not prevent any party from prosecuting the appeal.

(b) Where separate and distinct parcels of property are condemned in the same proceeding, the owner of any separate and distinct property may file a separate appeal to a jury in the superior court.

(c) If the amount awarded by the special master or the special master panel, if such a panel exists, is less than that found by the verdict of the jury, the condemnor shall be bound to pay the sum so finally adjudged less the amount previously deposited as provided in Code Section 22-2-110 plus lawful interest on the difference from the date of such deposit, in order to retain the property.

(d) If the condemnor fails to pay the amount of the award or judgment within ten days after the same is filed or entered, then the clerk shall issue execution upon such award or judgment which may be levied upon any property of the condemnor. (Ga. L. 1957, p. 387, § 15; Ga. L. 1998, p. 1539, § 8.)

The 1998 amendment, effective July 1, 1998, in subsection (c), inserted "or the special master panel, if such a panel exists," near the beginning, and substituted "such deposit" for "the order of the special master" near the end.

Law reviews. — For article surveying developments in Georgia real property law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 219 (1981).

JUDICIAL DECISIONS

One cannot voluntarily accept money, etc.

Despite the fact that subsection (a) states that the acceptance of the award "shall not prevent any party from prosecuting the appeal," this language is not applicable to appeals in which the condemnee challenges the right to condemn, as opposed to the amount of the award. Wrege v. Cobb County, 203 Ga. App. 241, 416 S.E.2d 562 (1992).

Applicability of section. — The provisions of subsection (a) were not applicable where the condemnees withdrew their original appeal with prejudice; further, the statutory language is not applicable to appeals in which the condemnee challenges the right to condemn as opposed to challenging the amount of the award. Fulton County v. Threatt, 210 Ga. App. 269, 435 S.E.2d 672 (1993).

Computation of interest.

In a condemnation proceeding, the trial court erred in failing to follow the mandates of O.C.G.A. § 22-2-113(c) which required the payment of interest from the date of the taking on the difference between the special master's award and the arbitrator's award. Threatt v. Forsyth County, 250 Ga. App. 838, 552 S.E.2d 123 (2001).

Interest accrues at rate of 7 percent. — The 12 percent rate of § 7-4-12 applies only to judgments; any interest accruing under this section for that period of time following the award of the special master until the jury verdict and entry of a final judgment is to be at the legal interest rate established by § 7-4-2, such rate being 7 percent per annum. City of Atlanta v. Wright, 159 Ga. App. 809, 285 S.E.2d 250 (1981).

Cited in Threatt v. Forsyth County, 262

Ga. App. 186, 585 S.E.2d 159 (2003).

22-2-114. Effect of deposit of award into court registry; conflicting claims as to deposit.

When the condemnor has paid into the registry of the court the amount provided for in the award of the special master or the special master panel, if such a panel exists, for the use and benefit of and subject to the demands of the condemnees, the effect of such payment into the registry of the court shall be the same as if paid to the condemnees directly, provided that the clerk shall pay out the money to the condemnees or their personal representatives upon proper proof submitted to him or her as to the quantity of their interests. Where there are conflicting claims, the clerk may require the conflicting parties to establish their claims before the court as is provided by law in other similar matters. (Ga. L. 1957, p. 387, § 16; Ga. L. 1998, p. 1539, § 9.)

The 1998 amendment, effective July 1, 1998, inserted "or the special master panel, if such a panel exists" near the beginning of the first sentence, and inserted "or her" near the end of the first sentence.

JUDICIAL DECISIONS

Court, not jury on appeal, etc.

What § 22-2-112 and this section make very clear is that the court, and not the jury on appeal, will decide the quantity of interest of each condemnee and will also decide the quality of such interest. Walker v. Georgia Power Co., 177 Ga. App. 493, 339 S.E.2d 728 (1986).

Cited in Metropolitan Atlanta Rapid Transit Auth. v. Gould Investors Trust, 169 Ga. App. 303, 312 S.E.2d 629 (1983); Hart v. City of Hamilton, 173 Ga. App. 135, 325 S.E.2d 791 (1984); Benton v. Patel, 257 Ga. 669, 362 S.E.2d 217 (1987); Bankston v. City of Barnesville, 221 Ga. App. 446, 471 S.E.2d 543 (1996).

ARTICLE 3

PROCEEDING BEFORE COURT

22-2-130. Authority to petition superior court for judgment in rem; applicability to acquisition of public property.

(a) Whenever the government of the State of Georgia, the United States government, or any person having the privilege of exercising the right of eminent domain desires to take or damage private property in pursuance of any law so authorizing and finds or believes that the title of the apparent or presumptive owner of such property is defective, doubtful, incomplete, or in controversy or that there are or may be unknown persons or nonresidents who have or may have some claim or demand thereon or some actual or contingent interest or estate therein or that there are minors or persons under disability who are or may be

interested therein or that there are taxes due or that should be paid thereon or concludes for any reason that it is desirable to have a judicial ascertainment of any question connected with the matter, such government or person may, through any authorized representative, petition the superior court of the county having jurisdiction for a judgment in rem against the property or interest, condemning the same to the use of the petitioner upon payment of just and adequate compensation therefor to the person or persons entitled to such payment.

(b) Notwithstanding the provisions of subsection (a) of this Code section, the provisions of this article shall also apply to the acquisition of public property or an interest therein by condemnation and the power of eminent domain. As used in this subsection, the term "public property" has the meaning provided for in Code Section 50-16-180. (Ga. L. 1914, p. 92, § 1; Code 1933, § 36-1104; Ga. L. 1937-38, Ex. Sess., p. 251, § 1; Ga. L. 1986, p. 1187, § 3.)

The 1986 amendment, effective April 7, 1986, designated the existing language as subsection (a) and added subsection (b).

JUDICIAL DECISIONS

Government property not "private property." — "Private property" does not include property owned by a government or a governmental entity. DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

The Department of Transportation may not condemn municipally owned property as the legislature has not clearly granted such authority or created a procedure therefore, and as such grant may not be implied from statutory provisions generally establishing a procedure for state agencies to condemn "private property." DOT v. City of Atlanta, 255 Ga. 124, 337 S.E.2d 327 (1985).

Relief for owners of remainder interest not made parties to in rem condemnation proceeding. — Owners of remainder interest in property who were not made parties to an in rem proceeding to condemn that property for a public purpose could obtain monetary relief for the value of their remaindermant but could not set aside the judgment of condemnation awarding title to a public body. Nelson v. State, 254 Ga. 611, 331 S.E.2d 554 (1985).

Separate equitable petition to enjoin condemnation under section not possible. — Plaintiff's claim, that defendants' intentions in planning to condemn his property without public need and without the funds to pay for the property presented a threat of irreparable harm to him in the future, was not cognizable under Georgia law because a separate equitable petition to enjoin a condemnation governed by the statute will not lie. Saffold v. Carter, 739 F. Supp. 1541 (S.D. Ga. 1990).

Discretion of condemning body. — See Georgia Power Co. v. Bishop, 162 Ga. App. 122, 290 S.E.2d 328 (1982), decided under Ga. L. 1957, p. 387.

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, §§ 3, 59.

22-2-131. Contents of petition.

(a) The petition referred to in Code Section 22-2-130 shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interest to be taken or damaged;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected;

(5) Such other facts as are necessary for a full understanding of the cause;

(6) A statement setting forth the necessity to condemn the private property and describing the public use for which the condemnor seeks the property; and

(7) A prayer for such judgment of condemnation as may be proper and desired.

(b) If any of the persons referred to in this Code section are minors or under disability, the fact shall be stated. (Ga. L. 1914, p. 92, § 2; Code 1933, § 36-1105; Ga. L. 2006, p. 39, § 14/HB 1313.)

The 2006 amendment, effective April 4, 2006, deleted "and" at the end of paragraph (a)(5); added paragraph (a)(6); and redesignated former paragraph (a)(6) as paragraph (a)(7). For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 3.

22-2-132. Order to appear, etc.; directions for notice and service thereof; attachment of process to petition; cause to proceed as in rem.

(a) Upon presentation of the petition, the presiding judge shall issue an order requiring the condemnor, the owner of the property or of any interest therein, and the representative of any owner to appear at a time and place named in the order and make known their objections if

any, rights, or claims as to the value of the property or of their interest therein, and any other matters material to their respective rights; provided, however, that if the petition includes affidavits from known and located persons with a legal claim, stating that such condemnees do not oppose the condemnation, no hearing pursuant to this Code section shall be required.

(b) The day named in the order shall be as early as may be convenient but shall be no less than 20 days from the date of the petition, due regard being given to the necessities of notice.

(c) The order shall give appropriate directions for notice and the service thereof.

(d) It shall not be necessary to attach any other process to the petition except the order referred to in subsection (a) of this Code section, and the cause shall proceed as in rem. (Ga. L. 1914, p. 92, § 3; Code 1933, § 36-1106; Ga. L. 2006, p. 39, § 15/HB 1313.)

The 2006 amendment, effective April 4, 2006, in subsection (a), substituted "shall issue an order" for "may issue an order" near the beginning, inserted "if any" following "make known their objections" near the middle, and added "; provided, however, that if the petition includes affidavits from known and located persons with a legal claim, stating that such condemnees do not oppose the condemnation, no hearing pursuant to this Code section shall be required" at the end; and inserted "but shall be no less than 20 days from the date of the petition" in the middle of subsection (b). For applicability, see editor's note.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 3.

22-2-134. Service of process — Discretion of judge to cause additional notice or service to be given; notification of tax collector or tax commissioner.

JUDICIAL DECISIONS

Cited in Ware v. Henry County Water & Sewerage Auth., 258 Ga. App. 778, 575 S.E.2d 654 (2002).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 3.

22-2-136. Appeal from assessors' award.

JUDICIAL DECISIONS

Cited in Georgia Dep't of Transp. v. Woodward, 254 Ga. 587, 331 S.E.2d 557 (1985).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 240.

22-2-137. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement.

(a) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the board of assessors nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be located. Said advertisement shall further show the date of the said original location of such highway as hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the

Department of Transportation and that any interested party may obtain a copy of same by writing to the Department of Transportation (One Georgia Center, 600 West Peachtree NW, Atlanta, Georgia 30308) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the board of assessors or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest actually taken for such public improvement. (Code 1933, § 36-1117, enacted by Ga. L. 1966, p. 320, § 1; Ga. L. 2011, p. 752, § 22/HB 142.)

The 2011 amendment, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted "(One Georgia Center, 600 West Peachtree NW, Atlanta, Georgia 30308)" for "(2 Capitol Square, Atlanta, Georgia 30334)" in the last sentence of subsection (b).

JUDICIAL DECISIONS

Private riverfront property is not unique. — Neither "privacy," which is inherent in ownership of all property, nor the fact that the condemned land was "riverfront" property, would authorize a charge on the condemned property having a value "peculiar" to the owner, or that the realty was "unique." Macon-Bibb County Water & Sewerage Auth. v. Reynolds, 165 Ga. App. 355, 299 S.E.2d 592 (1983).

Expert testimony on impact of temporary easement and value. — In a condemnation action, an expert was properly allowed to testify that a temporary easement had not diminished the fair market value of the land. If evidence could be adduced that the taking of a temporary easement had diminished the fair market value, competent evidence could also be admitted to establish the fact that the temporary taking had not diminished the fair market value. Bulgin v. Ga. DOT, 292 Ga. App. 1, 663 S.E.2d 730 (2008).

Changes in zoning regulations can be pertinent to value. — Where an owner's property would probably be rezoned, the trial court did not abuse its discretion in admitting the evidence thereof; however, testimony of the "highest and best use" of the property, by itself, was inadmissible when it involved a use precluded by the applicable zoning regulations in effect as of the date of taking. Unified Gov't v. Watson, 276 Ga. 276, 577 S.E.2d 769 (2003).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Market Value of Single-Family Residence — Market Comparison Appraisal, 5 POF2d 411.

Highest and Best Use of Property Taken Under Eminent Domain, 19 POF3d 613.

Probable Zoning Change as Bearing on Proof of Market Value in Eminent Domain Proceeding, 40 POF3d 395.

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 91.

ALR. — Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel, 59 ALR4th 308.

Elements and measure of compensation in eminent domain proceeding for temporary taking of property, 49 ALR6th 205.

22-2-138. Scope of award or verdict; molding of award or verdict; power of court to adjudge condemnation of title upon deposit of amount of award or verdict into court; disposition of award by court.

JUDICIAL DECISIONS

Trial judge is empowered to disburse condemnation proceeds to those justly entitled thereto, after hearing their respective claims. Hart v. City of Hamilton, 173 Ga. App. 135, 325 S.E.2d 791 (1984).

Cited in McDaniel v. DOT, 200 Ga. App. 674, 409 S.E.2d 552 (1991).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 91.

22-2-139. Right of interested persons to intervene; effect of subsequent proceedings on rights of condemnor.

JUDICIAL DECISIONS

City did make its interest known to the court where it filed a motion for a rehearing on the award contending the city did not receive the requisite notice of the motion to disburse the condemnation award, where the newly discovered deeds showed the city had an interest in the property, and where the award and the motion prayed for an equitable division of the proceeds. Hart v. City of Hamilton, 173 Ga. App. 135, 325 S.E.2d 791 (1984).

Cited in Bankston v. City of Barnesville, 221 Ga. App. 446, 471 S.E.2d 543 (1996).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 9A Am. Jur. Pleading and Practice Forms, Eminent Domain, § 240.

CHAPTER 3

EXERCISE OF POWER OF EMINENT DOMAIN FOR SPECIAL PURPOSES

Article 3

Construction and Operation of Waterworks and Sanitary Sewage Systems

Article 4

Construction, Operation, Etc., of Petroleum Pipelines and Gas Pipelines

Article 7

Ownership or Operation of Utility Systems

Article 8

Electric Transmission Lines

ARTICLE 1

CONSTRUCTION, MAINTENANCE, ETC., OF TELEGRAPH AND TELEPHONE LINES ALONG RAILROAD RIGHTS OF WAY

22-3-2. Manner of service of notice.

JUDICIAL DECISIONS

Contract alternative. — Cable company that possessed certificate of authorization from Georgia Public Service Commission that allowed it to exercise eminent domain under O.C.G.A. § 46-5-1(a) properly entered into contract with railroad, in lieu of eminent domain proceedings, to allow construction of communication lines along railroad's rights of way. Davis v. Williams Communs., Inc., 258 F. Supp. 2d 1348 (N.D. Ga. 2003).

ARTICLE 2

CONSTRUCTION AND OPERATION OF ELECTRIC POWER PLANTS

RESEARCH REFERENCES

ALR. — Eminent domain: review of electric power company's location of transmission line for which condemnation is sought, 19 ALR4th 1026.

PART 1

GENERAL PROVISIONS

22-3-20. Power of persons operating or constructing electric plants to purchase, lease, or condemn rights of way and easements.

Law reviews. — For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007).

JUDICIAL DECISIONS

This Code section is constitutional, etc.

In accord with Nolan v. Central Ga. Power Co. See Banks v. Georgia Power Co., 267 Ga. 602, 481 S.E.2d 200 (1997).

Effect of county ordinance impeding rights under section. — Pursuant to O.C.G.A. § 46-3-201(b)(9), the electric corporation, which had to condemn property in order to effectuate its project, did not have to demonstrate to the county the necessity or the appropriateness of its proposed project; thus, the county ordinance prohibiting the electric lines for three years was unconstitutional. Rabun County v. Ga. Transmission Corp., 276 Ga. 81, 575 S.E.2d 474 (2003).

Forsyth County, Ga., Unified Development Code §§ 21-6.1 and 21-6.5, were defective because they required a utility to successfully comply with the ordinance's procedures, and authorized the county to deny "any or all" portions of an application; as such, they were unconstitutional

infringements on the utility's legislatively-delegated power of eminent domain. Forsyth County v. Ga. Transmission Corp., 280 Ga. 664, 632 S.E.2d 101 (2006).

Cited in Banks v. Georgia Power Co., 220 Ga. App. 84, 469 S.E.2d 218 (1996).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 25 Am. Jur. Pleading and Practice Forms, Waterworks and Water Companies, § 2.

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

22-3-22. Condemnation of mills, factories, and dams.

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

PART 2

ACQUISITION OF RIGHT TO FLOOD ROADS AND HIGHWAYS

22-3-41. Power to acquire right to flood roads and highways.

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

22-3-43. Condemnation procedure; authorization of officers to act for state or county.

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

ARTICLE 3

CONSTRUCTION AND OPERATION OF WATERWORKS AND SANITARY SEWAGE SYSTEMS

22-3-60. Authority to lease, purchase, or condemn property or receive donations for waterworks and sewage systems.

Any nongovernmental entity constructing, owning, or operating any waterworks or sanitary sewerage system, or both, in this state shall have the right, power, privilege, and authority to lease, purchase, or condemn property or any interest therein, including easements, or to receive donations or grants of property or any interest therein, including easements, for the purpose of constructing and operating a waterworks, a water distribution system, a sewerage collection system, or a sewage treatment and disposal system, or any combination of such systems or facilities; provided, however, that prior to condemning property in any political subdivision, any such entity shall first obtain the consent of the governing authority of such political subdivision after the requirements of Code Section 22-1-10 have been satisfied. Consent shall be granted by resolution or ordinance. (Ga. L. 1889, p. 184, § 1; Civil Code 1895, § 2407; Civil Code 1910, § 2923; Code 1933, § 36-901; Ga. L. 1990, p. 731, § 1; Ga. L. 2000, p. 1514, § 1; Ga. L. 2006, p. 39, § 16/HB 1313.)

The 1990 amendment, effective July 1, 1990, substituted "waterworks or sanitary sewerage system, or both," for "waterworks" near the beginning of the Code section, and substituted the language beginning with "operating a waterworks" and ending with "systems or facilities" for "operating waterworks" at the end of the Code section.

The 2000 amendment, effective May 1, 2000, substituted "Any nongovernmental entity" for "Any person" at the beginning and added the proviso at the end.

The 2006 amendment, effective April 4, 2006, substituted "after the requirements of Code Section 22-1-10 have been satisfied. Consent shall be granted by resolution or ordinance" for ", which consent may be granted by resolution or ordinance" at the end of this Code section. For applicability, see editor's note.

Cross references. — Acquisition and construction of water and sewage systems, § 36-34-5.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For annual survey article on real property law, see 52 Mercer L. Rev. 383 (2000). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

22-3-61. Condemnation procedure.

If a person seeking to exercise the power of eminent domain under this article fails to procure, by contract, title to the land necessary or proper for the construction and successful operation of a waterworks or sanitary sewerage system, or both, and the parties cannot agree upon the damage done, the same shall be assessed as provided in Chapter 2 of this title. (Ga. L. 1889, p. 184, § 2; Civil Code 1895, § 2408; Civil Code 1910, § 2924; Code 1933, § 36-902; Ga. L. 1990, p. 731, § 1.)

The 1990 amendment, effective July 1, 1990, substituted "a waterworks or sanitary sewerage system, or both," for "waterworks".

22-3-62. Applicability of article.

The powers granted by this article shall apply to those persons who have entered into a contract with the proper authorities for supplying water for public purposes and to such persons providing water or sanitary sewerage services through water or sanitary sewerage systems, or both, which have been permitted by the Environmental Protection Division of the Department of Natural Resources. (Ga. L. 1889, p. 184, § 3; Civil Code 1895, § 2409; Civil Code 1910, § 2925; Code 1933, § 36-903; Ga. L. 1990, p. 731, § 1.)

The 1990 amendment, effective July 1, 1990, deleted "only" preceding "to those persons" near the beginning of the section, and added the language beginning with "and to such persons" and ending with "Department of Natural Resources" at the end of the Code section.

22-3-63. Authority to condemn property for purpose of constructing a waterworks, water distribution system, sewage collection system, or sewage treatment and disposal system.

Any other provision of law to the contrary notwithstanding, any nongovernmental entity which:

(1) Is privately owned and is operated under the collective management and control of the owners;

(2) Was in the business of providing water supply and sewerage collection and disposal prior to July 1, 1978;

(3) Has continuously owned a sanitary sewerage system since July 1, 1978, permitted by the Environmental Protection Division of the Department of Natural Resources; and

(4) On May 1, 2000, owns and operates one or more sewerage collection treatment and disposal systems serving 1,000 or more customers

shall have the authority to condemn property or any interest therein, including easements, for the purpose of constructing and operating a waterworks, a water distribution system, a sewerage collection system, or a sewage treatment and disposal system, or any combination of such systems or facilities; provided, however, that such authority shall obtain the consent of the governing authority of the county or municipality that controls the land sought to be condemned in accordance with Code Section 22-3-60. The authority granted by this Code section shall extend only to such counties and those counties immediately adjacent to such counties in which such entity owned or operated such waterworks or systems or combination as of January 1, 2000; and provided, further, that the authority provided for in this Code section shall terminate with respect to any entity if any interest in such business is transferred to another person or entity except through inheritance. (Code 1981, § 22-3-63, enacted by Ga. L. 2000, p. 1514, § 2; Ga. L. 2006, p. 39, § 16/HB 1313.)

Effective date. — This Code section became effective May 1, 2000.

The 2006 amendment, effective April 4, 2006, inserted "obtain the consent of the governing authority of the county or municipality that controls the land sought to be condemned in accordance with Code Section 22-3-60. The authority granted by this Code section shall" in the middle of paragraph (4). For applicability, see editor's note.

Cross references. — Acquisition and construction of water and sewage systems, § 36-34-5.

Code Commission notes. — Pursuant to Code Section 28-9-5, in 2000, "May 1, 2000," was substituted for "the effective date of this Code section" in paragraph (4).

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

ARTICLE 4

CONSTRUCTION, OPERATION, ETC., OF PETROLEUM PIPELINES AND GAS PIPELINES

Editor's notes. — Ga. L. 1995, p. 161, effective July 1, 1995, repealed the Code sections formerly codified at this article and enacted the current article. The former unit consisted of Code Sections 22-3-70 through 22-3-72 (Part 1) and 22-3-80 through 22-3-83 (Part 2) and was based on Ga. L. 1981, Ex. Sess., p. 8 (Code

enactment Act) and Ga. L. 1994, p. 229, §§ 1 and 2. Ga. L. 1995, p. 161 also enacted an Article 4, effective from March 30, 1995, until July 1, 1995, which consisted of Code Section 22-3-83, containing provisions identical to those in present Code Section 22-3-88.

Law reviews. — For note on 1995 amendments and enactments of sections in this article, see 12 Ga. St. U.L. Rev. 184 (1995).

JUDICIAL DECISIONS

Petroleum pipeline operators were entitled to clear easements. — Operators of petroleum pipelines were entitled to clear easements to permit aerial inspection and access by maintenance crews. Avery v. Colonial Pipeline Co., 213 Ga. App. 388, 444 S.E.2d 363 (1994).

RESEARCH REFERENCES

Am. Jur. Trials. — Trial of a Gas Pipeline Leak and Explosion Case, 25 Am. Jur. Trials 415.

22-3-80. Legislative findings.

The General Assembly finds and declares that, based on an authorized study by the Petroleum Pipeline Study Committee created by the General Assembly, while petroleum pipelines are appropriate and valuable for use in the transportation of petroleum and petroleum products, there are certain problems and characteristics indigenous to such pipelines which require the enactment and implementation of special procedures and restrictions on petroleum pipelines and related facilities as a condition of the grant of the power of eminent domain to petroleum pipeline companies. (Code 1981, § 22-3-80, enacted by Ga. L. 1995, p. 161, § 2.)

22-3-81. Definitions.

As used in this article:

(1) "Pipeline" means a pipeline constructed or to be constructed as a common carrier in interstate or intrastate commerce for the transportation of petroleum or petroleum products in or through this state.

(2) "Pipeline company" means a corporation organized under the laws of this state or which is organized under the laws of another state and is authorized to do business in this state and which is specifically authorized by its charter or articles of incorporation to construct and operate pipelines for the transportation of petroleum and petroleum products.

(3) "Pipeline facility" or "pipeline facilities" means and includes the pipeline and all equipment or facilities, including lateral lines, essential to the operation of the pipeline but shall not include any storage tank or storage facility which is not being constructed as a part of the operation of the pipeline. (Code 1981, § 22-3-81, enacted by Ga. L. 1995, p. 161, § 2.)

22-3-82. Right to acquire property or property interests by eminent domain; notice to landowner; relocations; right of reasonable access; compensation for damage incident to entry.

(a) Subject to the provisions and restrictions of this article, pipeline companies are granted the right to acquire property or interests in property by eminent domain for the construction, reconstruction, operation, and maintenance of pipelines in this state; provided, however, that prior to instigating eminent domain proceedings or threatening to do so, the pipeline company shall cause to be delivered to each landowner whose property may be condemned a written notice containing the following language in boldface type:

"CODE SECTIONS 22-3-80 THROUGH 22-3-87 OF THE OFFICIAL CODE OF GEORGIA ANNOTATED PROVIDE SPECIFIC REQUIREMENTS WHICH MUST BE FOLLOWED BY PETROLEUM PIPELINE COMPANIES BEFORE THEY MAY EXERCISE THE RIGHT TO CONDEMN YOUR PROPERTY. THOSE CODE SECTIONS ALSO PROVIDE SPECIFIC RIGHTS FOR YOUR PROTECTION. YOU SHOULD MAKE YOURSELF FAMILIAR WITH THOSE REQUIREMENTS AND YOUR RIGHTS PRIOR TO CONTINUING NEGOTIATIONS CONCERNING THE SALE OF YOUR PROPERTY TO A PETROLEUM PIPELINE COMPANY."

(b) The restrictions and conditions imposed by this article on the exercise of the power of eminent domain by petroleum pipeline companies shall not apply to relocations of pipelines necessitated by the exercise of a legal right by a third party or to any activities incident to the maintenance of an existing pipeline or existing pipeline right of way. A pipeline company shall have a right of reasonable access to property proposed as the site of a pipeline for the purpose of conducting a survey of the surface of such property for use in determining the suitability of such property for placement of a pipeline.

(c) After obtaining the certificate of convenience and necessity provided for in Code Section 22-3-83 and after complying with the notice requirements set forth in subsection (a) of this Code section, a pipeline company shall have a right of reasonable access to any property proposed as the site of a pipeline for the purpose of conducting

additional surveying which may be necessary in preparing its submission to the Department of Natural Resources as provided for in Code Section 22-3-84.

(d) The owner of any property or property interest which is entered by a pipeline company for the purpose of surveying such property, as allowed in this Code section, or for access to or maintenance or relocation of an existing pipeline shall have the right to be compensated for any damage to such property incident to such entry. Any survey conducted pursuant to this article shall be conducted in such a fashion as to cause minimal damage to the property surveyed. (Code 1981, § 22-3-82, enacted by Ga. L. 1995, p. 161, § 2; Ga. L. 1996, p. 6, § 22.)

The 1996 amendment, effective February 12, 1996, part of an Act to correct errors and omissions in the Code, substituted "in this Code section" for "herein" in the first sentence of subsection (d).

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

22-3-83. Certificate of public convenience and necessity; requirements.

(a) Before exercising the right of eminent domain as authorized in this article, a pipeline company shall first obtain from the commissioner of transportation or the commissioner's designee a certificate of public convenience and necessity that such action by the pipeline company is authorized. Such certificate shall not be unreasonably withheld.

(b) The commissioner shall prescribe regulations pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," relative to the requirements for obtaining a certificate of public convenience and necessity which shall include:

(1) A requirement that the application for such certificate shall include a description of the proposed project including its general route, a description of the public convenience and necessity which support the proposed pipeline route, the width of the proposed pipeline corridor up to a maximum width of one-third mile, and a showing that use of the power of eminent domain may be necessary to construction of the pipeline, and a showing that the public necessity for the petroleum pipeline justifies the use of the power of eminent domain;

(2) A provision for reasonable public notice of the application and the proposed route;

(3) Provision for a hearing on the application and the filing and hearing of any objections to such application;

(4) A requirement that all hearings shall be held and a final decision rendered on any application not later than 90 days from the date of the publication of notice required in paragraph (2) of this subsection; and

(5) Such other reasonable requirements as shall be deemed necessary or desirable to a proper determination of the application.

(c) In the event the application is not approved or denied within the time period provided for in paragraph (4) of subsection (b) of this Code section, the application shall be deemed to be approved by operation of law.

(d) The approval and issuance of the certificate of public convenience and necessity shall not be subject to review. The denial of the certificate may be reviewed by a judge of the superior court of the county in which the pipeline company has an agent and place of doing business. The review shall be by petition filed within 30 days of the date of disapproval of the application and shall be determined on the basis of the record before the commissioner. The action of the commissioner shall be affirmed if supported by substantial evidence. (Code 1981, § 22-3-83, enacted by Ga. L. 1995, p. 161, § 2; Ga. L. 1996, p. 6, § 22.)

The 1996 amendment, effective February 12, 1996, part of an Act to correct errors and omissions in the Code, inserted "and" at the end of paragraph (4) of subsection (b).

22-3-84. Permit from director of Environmental Protection Division of Department of Natural Resources; requirements and considerations; approval.

(a) In addition to obtaining a certificate as required in Code Section 22-3-83, a pipeline company shall, prior to the exercise of the power of eminent domain, obtain a permit from the director of the Environmental Protection Division of the Department of Natural Resources as provided in this Code section.

(b) The Board of Natural Resources shall, pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," issue rules and regulations governing the obtaining of the permit provided for in subsection (a) of this Code section which shall include:

(1) Reasonable public notice to an owner of property who, after reasonable efforts, cannot personally be given the notice in subsection (a) of Code Section 22-3-82;

(2) Reasonable public notice of the filing of an application for a permit;

(3) Provisions for hearings on all applications for such permits; and

(4) A requirement that no such permit shall be granted by the division unless, prior to the construction of any portion of the petroleum pipeline project for which the use of the power of eminent domain may be required, the pipeline company has submitted the proposed siting of such portion of the pipeline project to the division with appropriate notices thereof to affected parties and unless the division director determines after a hearing that the location, construction, and maintenance of such portion of the pipeline is consistent with and not an undue hazard to the environment and natural resources of this state, determined in accordance with the factors set forth in subsection (c) of this Code section.

(c) In making the decision required by paragraph (4) of subsection (b) of this Code section, the director shall determine:

(1) Whether the proposed route of such portion of the pipeline is an environmentally reasonable route;

(2) Whether other corridors of public utilities already in existence may reasonably be used for the siting of such portion of the pipeline;

(3) The existence of any local zoning ordinances and that such portion of the project will comply with those ordinances unless to require such compliance would impose an unreasonable burden on the project as weighed against the purpose of such ordinances;

(4) That ample opportunity has been afforded for public comment, specifically including but not limited to comment by the governing body of any municipality or county within which the proposed project or any part thereof is to be located; and

(5) Such reasonable conditions to the permit as will allow the monitoring of the effect of the petroleum pipeline upon the property subjected to eminent domain and the surrounding environment and natural resources.

(d) In the event an application under this Code section is not approved or denied within 120 days of the date of the publication of notice required in paragraph (2) of subsection (b) of this Code section, the application shall be deemed to be approved by operation of law. (Code 1981, § 22-3-84, enacted by Ga. L. 1995, p. 161, § 2; Ga. L. 1996, p. 6, § 22.)

The 1996 amendment, effective February 12, 1996, part of an Act to correct errors and omissions in the Code, in subsection (c), deleted "and" at the end of paragraph (3), and substituted "; and" for a period at the end of paragraph (4); and, in subsection (d), substituted "paragraph (2)" for "paragraph (1)".

22-3-85. Procedure for hearings and appeals.

All hearings and appeals on applications for certificates and permits required under this article shall be conducted in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," provided that if the final decision of the Administrative Law Judge on any appeal is not rendered within 120 days from the date of filing of a petition for review, the decision of the director shall be affirmed by operation of law; and provided further that judicial review of the approval or denial of an application under Code Section 22-3-84 shall be governed by Code Section 12-2-1. (Code 1981, § 22-3-85, enacted by Ga. L. 1995, p. 161, § 2.)

22-3-86. Use of condemnation procedures.

When a pipeline company which has obtained the certification and permits required in this article is unable to acquire the property or interest required for such certified or permitted project after reasonable negotiation with the owner of such property or interest, the company may acquire such property or interest by the use of the condemnation procedures authorized by Chapter 2 of this title. (Code 1981, § 22-3-86, enacted by Ga. L. 1995, p. 161, § 2.)

22-3-87. Compensation for damage to property not acquired.

If the portion of the petroleum pipeline route chosen and approved pursuant to Code Section 22-3-84 unreasonably impacts any other property of the same owner which is not acquired by eminent domain as a part of such portion of the project, there shall be a right of compensation available under the laws of eminent domain for the fair market value of any such damage upon the trial of the case of the parcel taken. (Code 1981, § 22-3-87, enacted by Ga. L. 1995, p. 161, § 2.)

22-3-88. Authority of persons constructing or operating gas pipelines or furnishing gas for heating, lighting, or power purposes to exercise power of eminent domain.

The power of eminent domain may be exercised by persons who are or may be engaged in constructing or operating pipelines for the transportation or distribution of natural or artificial gas and by persons who are or may be engaged in furnishing natural or artificial gas for heating, lighting, or power purposes in the State of Georgia. (Code 1981, § 22-3-88, enacted by Ga. L. 1995, p. 161, § 1.)

Editor's notes. — Ga. L. 1995, p. 161, § 1 enacted a Code Section 22-3-83, effective from March 30, 1995, until July 1, 1995, when the present article became

effective. The provisions of prior Code Section 22-3-88 were identical to those of present Code Section 22-3-88.

RESEARCH REFERENCES

ALR. — Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding, 23 ALR4th 631.

ARTICLE 5

CONSTRUCTION, OPERATION, ETC., OF WATERSHED PROJECTS, FLOOD-CONTROL PROJECTS, ETC., BY COUNTIES

RESEARCH REFERENCES

ALR. — Local use zoning of wetlands or flood plain as taking without compensation, 19 ALR4th 756.

22-3-100. Authority of counties to exercise power of eminent domain.

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

ARTICLE 6

CONSTRUCTION OF LIGHTHOUSES, BEACONS, ETC., BY UNITED STATES GOVERNMENT

22-3-121. Acquisition of right to enter lands and clear or cut timber for purposes of carrying out survey of coasts — Generally.

RESEARCH REFERENCES

ALR. — Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use, 22 ALR4th 840.

ARTICLE 7

OWNERSHIP OR OPERATION OF UTILITY SYSTEMS

Effective date. — This article became effective May 1, 2000.

Cross references. — Acquisition and construction of water and sewage systems, § 36-34-5.

22-3-140. Authorization to utilize the declaration of taking method of eminent domain.

Any state agency, political subdivision of the state, county, or municipality owning or operating a sewage collection, treatment, or disposal system, a water or waste-water system, a gas or gas line system, an electrical or electrical line system, or a drain or storm-water system is authorized to utilize the declaration of taking method of eminent domain in order to acquire any private property in fee simple or in any lesser interest, including easements, for such systems and purposes, as such method of eminent domain is provided in Article 1 of Chapter 3 of Title 32. This article and method of eminent domain shall be supplementary to and cumulative of the methods of procedure for the exercise of the power of eminent domain prescribed in this title. (Code 1981, § 22-3-140, enacted by Ga. L. 2000, p. 1514, § 3.)

ARTICLE 8

ELECTRIC TRANSMISSION LINES

Effective date. — This article became effective July 1, 2004.

Editor's notes. — Ga. L. 2004, p. 568, § 3, not codified by the General Assembly, provides that this article: "shall apply to the exercise of eminent domain to acquire easements or other property interests for which land acquisition negotiations for purposes of constructing or expanding one or more electric transmission lines begin on or after such date. The provisions of this Act relating to additional compensation, reconveyance, and quitclaim shall apply to easements and other property interests acquired on or after July 1, 2004, through the exercise of eminent domain."

22-3-160. "Utility" defined.

As used in this article, the term "utility" means a person, corporation, or other entity that generates, transmits, distributes, supplies, or sells electricity for public or private use in this state or generates electricity in this state for transmission or distribution outside this state. (Code 1981, § 22-3-160, enacted by Ga. L. 2005, p. 60, § 22/HB 95.)

Effective date. — This Code section became effective April 7, 2005.

Editor's notes. — Ga. L. 2005, p. 60, § 22, redesignated the former provisions of this Code section as Code Section 22-3-160.1 and enacted the present provisions.

Law reviews. — For article on the 2004 enactment of this article, see 21 Ga. St. U.L. Rev. 157 (2004).

22-3-160.1. Public hearings required; exception to hearing requirement.

(a) Before exercising the right of eminent domain for purposes of constructing or expanding an electric transmission line with a design operating voltage of 115 kilovolts or greater and a length of one mile or more, any utility shall schedule and hold one or more public meetings with an opportunity for comment by members of the public. In any proceeding to exercise the right of eminent domain for purposes of an electric transmission line for which the utility began land acquisition negotiations on or after July 1, 2004, the utility shall be required to demonstrate substantial compliance with this Code section as a condition for exercising the right of eminent domain.

(b) Prior to the public meeting or meetings required by this Code section, the utility shall provide adequate public notice of the utility's intent to construct or expand an electric transmission line and adequate public notice of the public meeting or meetings related to the electric transmission line as follows:

(1) By publishing adequate public notice of said public meeting or meetings in a newspaper of general circulation in each county in which any portion of the electric transmission line is to be constructed or expanded. Said notice shall be published at least 30 days prior to the date of the first public meeting related to the electric transmission line and shall include the following: the date, time, and location of each meeting; a statement that the purpose of the meeting or meetings is to provide public notice of the utility's intent to construct or expand an electric transmission line for which the right of eminent domain may be exercised; a description of the proposed project including the general route of the electric transmission line and the general property area within which the utility intends to construct or expand the electric transmission line; the width of the proposed transmission line route; and a description of the alternative construction approaches considered by the utility and a statement of why such alternatives were rejected by the utility; and

(2) By providing written notice of the public meeting or meetings, by means of certified mail, to each owner of property, as indicated in the tax records of the county in which such property is located, over which the utility intends to construct or expand the electric transmission line and to the chairpersons or chief executives of the counties and the mayors of any municipalities in which such property is located. Such notice shall be mailed at least 30 days prior to the date of the first public meeting related to the electric transmission line and shall include all of the information required by paragraph (1) of this subsection.

(c) At least one public meeting shall be held in each county in which the electric transmission line would be located. In any county in which the electric transmission line would require acquisition of property rights from more than 50 property owners, two or more public meetings shall be held. The public meetings shall be held in an accessible location and shall be open to members of the public. At least one of the public meetings shall commence between 6:00 P.M. and 7:00 P.M., inclusive, on a business weekday. At the public meetings, the utility shall provide a description of the proposed project including the general route of the electric transmission line and the general property area within which the utility intends to construct or expand the electric transmission line, the width of the proposed transmission line route, and a description of the alternative construction approaches considered by the utility and a statement of why such alternatives were rejected by the utility. At the public meetings, the utility shall allow a reasonable opportunity for members of the public to express their views on the proposed project and to ask questions.

(d) A utility shall not be required to give notice of or hold public meetings with respect to any of the following:

(1) An electric transmission line to be constructed or expanded by a utility on an established right of way or land that was acquired by the utility or any other utility prior to July 1, 2004;

(2) An electric transmission line for which the utility began land acquisition negotiations prior to July 1, 2004;

(3) An electric transmission line to be constructed or expanded by a utility on an established right of way or land that is owned or controlled by a state agency, a county, a municipality, or an agency, bureau, or department of the United States;

(4) An electric transmission line to be constructed or expanded by a utility for the purpose of relocating an existing electric transmission line at the direction, order, or request of a state agency, a county, a municipality, or an agency, bureau, or department of the United States;

(5) An electric transmission line to be constructed or expanded by a utility without exercising the power of eminent domain to acquire the right of way or easement area for such line; or

(6) An electric transmission line to be constructed by a utility for the purpose of serving an electric substation or switching station to be constructed on a site that is owned or controlled by a utility customer to be served by such substation or switching station. (Code 1981, § 22-3-160, enacted by Ga. L. 2004, p. 568, § 2; Code 1981, § 22-3-160.1, as redesignated by Ga. L. 2005, p. 60, § 22/HB 95.)

The 2005 amendment, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, redesignated former Code Section 22-3-160 as this Code section and in subsection (a), substituted "any utility" for "any person, corporation, or other entity that generates, transmits, distributes, supplies, or sells electricity for public or private use in this state or generates electricity in this state for transmission or distribution outside this state (hereinafter in this article referred to as 'utility')".

22-3-161. Selection of route for electric transmission line; settlement negotiations with property owners.

(a) On and after July 1, 2004, before exercising the right of eminent domain for purposes of constructing or expanding an electric transmission line described in subsection (a) of Code Section 22-3-160.1, the utility shall select a practical and feasible route for the location of the electric transmission line. In selecting the route for the location of the electric transmission line, the utility shall consider existing land uses in the geographic area where the line is to be located, existing corridors, existing environmental conditions in the area, engineering practices related to the construction and operation of the line, and costs related to the construction, operation, and maintenance of the line.

(b) After the utility has selected the preferred route for the location of an electric transmission line, the utility shall attempt in good faith to negotiate a settlement with each property owner from whom the utility needs to acquire property rights for the line. In connection with the negotiations, the utility shall provide the property owner with a written offer to purchase the property rights, a document that describes the property rights, and a drawing that shows the location of the line on the owner's property.

(c) The requirements of subsections (a) and (b) of this Code section shall not apply to an electric transmission line described in subsection (d) of Code Section 22-3-160.1. (Code 1981, § 22-3-161, enacted by Ga. L. 2004, p. 568, § 2; Ga. L. 2005, p. 60, § 22/HB 95.)

The 2005 amendment, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, substituted "22-3-160.1" for "22-3-160" in subsections (a) and (c).

22-3-162. Application; additional compensation or reconveyance.

(a) This Code section shall apply to any easement or other property interest acquired on or after July 1, 2004, through exercise of the right of eminent domain for purposes of constructing or expanding an electric transmission line:

(1) With a capacity of 230 kilovolts or less if the utility has not begun such construction or expansion within 12 years from the date

of acquisition and the land burdened by the easement or other property interest is not adjacent to an electric transmission line corridor in existence 12 years from the date of acquisition;

(2) With a capacity of more than 230 kilovolts if the utility has not begun such construction or expansion within 15 years from the date of acquisition and the land burdened by the easement or other property interest is not adjacent to an electric transmission line corridor in existence 15 years from the date of acquisition; and

(3) Of any capacity if the land burdened by the easement or other property interest is adjacent to an electric transmission line corridor in existence 15 years after the date of acquisition and the utility has not begun the construction or expansion for which the easement or other property right was acquired within 15 years from the date of acquisition.

(b) When this Code section becomes applicable to an easement or other property interest, the owner of the land burdened by such easement or property interest may apply to the utility that acquired the easement or other property interest or such utility's successor or assign for reconveyance or quitclaim of the easement or other property interest or for additional compensation for such easement or other property interest. The application shall be in writing, and the utility or its successor or assign shall act on the application within 60 days by:

(1) Executing a reconveyance or quitclaim of the easement or property interest upon receipt of compensation not to exceed the amount of the compensation paid by the utility for the easement or property interest at the time of acquisition; or

(2) Paying additional compensation to the owner of the land burdened by the easement or other property interest, such compensation to be calculated by subtracting the price paid by the utility for the easement or other property interest at the time of acquisition from the fair market value of the easement or other property interest at the time this Code section becomes applicable to such easement or other property interest.

(c) The choice between additional compensation or reconveyance or quitclaim shall be at the discretion of the utility or its successor or assign. (Code 1981, § 22-3-162, enacted by Ga. L. 2004, p. 568, § 2.)

Law reviews. — For survey article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008).

CHAPTER 4

RELOCATION OF PERSONS, BUSINESSES, ETC., DISPLACED BY FEDERAL-AID PROJECTS

Law reviews. — For survey article on recent developments in Georgia law of remedies, see 34 Mercer L. Rev. 397 (1982). For annual survey article on local government law, see 52 Mercer L. Rev. 341 (2000).

RESEARCH REFERENCES

ALR. — Validity, construction, and application of state relocation assistance laws, 49 ALR4th 491.

22-4-1. Short title; "Uniform Act" defined.

(a) This chapter shall be known as "The Georgia Relocation Assistance and Land Acquisition Policy Act."

(b) As used in this chapter, the term "Uniform Act" means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Uniform Relocation Act Amendments of 1987, Title IV of Public Law 100-17. (Ga. L. 1973, p. 512, § 1; Ga. L. 1989, p. 213, § 1.)

The 1989 amendment, effective March 30, 1989, designated the existing provisions as subsection (a), deleted "of 1973" at the end of subsection (a), and added subsection (b).

Code Commission notes. — Pursuant to Code Section 28-9-5, in 1996, quotation marks that enclosed "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970," and "Uniform Relocation Act Amendments of 1987," were deleted in subsection (b).

22-4-2. Legislative findings and declaration of necessity.

The General Assembly finds and declares that the prompt and equitable relocation and reestablishment of persons, businesses, farmers, and nonprofit organizations displaced when the state, any of its agencies or institutions (other than the Department of Transportation), or any county, municipal corporation, school district, political subdivision, public authority, public agency, public corporation, or public instrumentality, excluding electric membership corporations as defined in paragraph (3) of Code Section 46-3-171, (collectively referred to in this chapter as "several public entities") created under the Constitution and laws of the State of Georgia acquires land, with federal financial assistance, for a public use, are necessary to ensure that certain individuals do not suffer disproportionate injuries as a result of programs designed for the benefit of the public as a whole. The General Assembly finds and declares that the establishment of uniform fair land acquisition policies will be beneficial to the public. The General Assembly finds that the Congress of the United States has, by enacting the Uniform Act, made funds available for relocation assistance and the implementation of certain land acquisition policies. The General Assembly further finds that the Congress of the United States has by the aforesaid statute provided for the total cessation after July 1, 1972, of federal financial assistance for public works projects which will displace persons or businesses unless the state complies with the requirements of the Uniform Act. The General Assembly finds and declares that the construction of public works projects with federal financial assistance is vital to the state and is in the best interest of the people of the state and that providing for the continuation of federal financial assistance at the highest possible level for public works projects is a legitimate public purpose. The General Assembly further finds that the cost of providing the assistance and services provided for in this chapter should be, and the same are declared to be, part of the necessary cost of federal-aid public works projects. (Ga. L. 1973, p. 512, § 2; Ga. L. 1989, p. 213, § 2; Ga. L. 1990, p. 8, § 22.)

The 1989 amendment, effective March 30, 1989, inserted ", excluding electric membership corporations as defined in paragraph (3) of Code Section 46-3-171" near the middle of the first sentence; substituted "Uniform Act" for "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971" in the third sentence;

and substituted "the Uniform Act" for "Public Law 91-646" at the end of the fourth sentence.

The 1990 amendment, effective February 16, 1990, part of an Act to correct errors and omissions in the Code, revised language and punctuation in this Code section.

22-4-3. Applicability of Code Section 22-1-1 to chapter.

The definitions contained in paragraphs (6) and (8) of Code Section 22-1-1 shall not apply to this chapter. (Code 1981, § 22-4-3, Ga. L. 2006, p. 39, § 17/HB 1313.)

The 2006 amendment, effective April 4, 2006, substituted "paragraphs (6) and (8)" for "paragraphs (1) and (3)". For applicability, see editor's note.

Editor's notes. — This Code section was created as part of the Code revision and was thus enacted by Ga. L. 1981, Ex. Sess., p. 8.

Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall apply to those condemnation proceedings filed on or after February 9, 2006, where title has not vested in the condemning authority unless constitutionally prohibited.

Law reviews. — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

22-4-4. Payments by public entities for relocation and replacement housing expenses.

The several public entities are authorized to and shall make or approve the payments required by Section 210 of the Uniform Act for the relocation expenses and replacement housing expenses of any person, family, business, farm operation, or nonprofit organization displaced by federal-aid projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities. (Ga. L. 1973, p. 512, § 3; Ga. L. 1989, p. 213, § 3.)

The 1989 amendment, effective March 30, 1989, substituted "Uniform Act" for "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971," and deleted "public works" preceding "projects".

22-4-5. Providing of relocation assistance advisory services by public entities.

The several public entities are authorized to and shall provide the relocation assistance advisory services required by Section 205 of the Uniform Act for any person, family, business, farm operation, or nonprofit organization displaced by federal-aid projects in the state, the costs of which are now or hereafter financed in whole or in part from

federal funds allocated to any of the several public entities. (Ga. L. 1973, p. 512, § 4; Ga. L. 1989, p. 213, § 4.)

The 1989 amendment, effective March 30, 1989, substituted "Section 205 of the Uniform Act" for "Section 210 of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971," and deleted "public works" preceding "projects".

22-4-6. Payments by public entities for expenses incidental to property transfer, for mortgage penalties, and for property taxes.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Act for expenses incidental to the transfer of real property acquired by any of the several public entities, for prepayment of mortgage penalties, and for a pro rata portion of real property taxes on real property acquired by any of the several public entities from any person, family, business, farm operation, or nonprofit organization displaced by federal-aid projects in the state, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to any of the several public entities. (Ga. L. 1973, p. 512, § 5; Ga. L. 1989, p. 213, § 5.)

The 1989 amendment, effective March 30, 1989, substituted "Uniform Act" for "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971," and deleted "public works" preceding "projects".

22-4-7. Payments by state, public agencies, etc., for litigation expenses — Condemnation proceedings.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Act for litigation expenses actually incurred by any person, family, business, farm operation, or nonprofit organization which is a condemnee in any condemnation proceeding brought by an acquiring public entity to acquire real property for a federal-aid project, the cost of which is now or hereafter financed in whole or in part from federal funds allocated to an acquiring public entity, if the final judgment is that the acquiring public entity cannot acquire the real property by condemnation or the condemnation proceeding is formally abandoned by the acquiring public entity. (Ga. L. 1973, p. 512, § 6; Ga. L. 1989, p. 213, § 6.)

The 1989 amendment, effective March 30, 1989, substituted "Uniform Act" for "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971," and deleted "public works" preceding "project".

JUDICIAL DECISIONS

This statutory authority for payment of litigation expenses, etc.

This Code section provides a remedy to recover attorney fees separate and apart from a condemnation proceeding where just and adequate compensation is at issue. DOT v. B & G Realty, Inc., 197 Ga. App. 613, 398 S.E.2d 762 (1990).

Cited in West v. Mayor of Atlanta, 248 Ga. 844, 286 S.E.2d 299 (1982).

22-4-8. Payments by public entities for litigation expenses — Inverse condemnation proceedings.

The several public entities are authorized to and shall make or approve the payments required by Section 305(2) of the Uniform Act for litigation expenses actually incurred by any person, family, business, farm operation, or nonprofit organization which is the plaintiff in any inverse condemnation proceeding brought against an acquiring public entity in which judgment is rendered in favor of the plaintiff for real property taken by the acquiring public entity in its execution of any federal-aid project, the costs of which are now or hereafter financed in whole or in part from federal funds allocated to the acquiring public entity. (Ga. L. 1973, p. 512, § 7; Ga. L. 1989, p. 213, § 7.)

The 1989 amendment, effective March 30, 1989, substituted "Uniform Act" for "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971," and deleted "public works" preceding "project".

Law reviews. — For survey article on recent developments in Georgia law of remedies, see 34 Mercer L. Rev. 397 (1982).

JUDICIAL DECISIONS

No right of action for expenses against city. Where condemnation was for purpose of acquiring land necessary for transit authority, fact that city institutes eminent domain proceedings in and of itself gives no right of action for expenses against the city under this section. Where the city is the legal condemnor, the transit authority, not the city, is the acquiring public entity for purposes of this section. West v. Mayor of Atlanta, 248 Ga. 844, 286 S.E.2d 299 (1982).

Prerequisite to right to compensation. — Plaintiffs could not seek compensation under this section where they did not prevail in their inverse condemnation action. Benton v. Savannah Airport Comm'n, 241 Ga. App. 536, 525 S.E.2d 383 (1999).

22-4-9. Policies guiding acquisition of real property for federal-aid projects.

In acquiring real property for any federal-aid project, the costs of which are financed in whole or in part from federal funds allocated to an acquiring public entity, such public entity shall be guided by the land acquisition policies required by Section 301 of the Uniform Act to the

greatest extent practicable. (Ga. L. 1973, p. 512, § 8; Ga. L. 1989, p. 213, § 8.)

The 1989 amendment, effective March 30, 1989, deleted "public works" preceding "project" near the beginning of the Code section, substituted "Section 301 of the Uniform Act to the greatest extent practicable." for "Section 305(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, and shall, to the greatest extent practicable, be guided by the following policies:" near the end of the introductory language, and deleted paragraphs (1) through (9).

JUDICIAL DECISIONS

No private right of action. — This section does not create a private right of action in favor of a landowner, but merely addresses policies that should guide state agencies when they acquire real property for federal-aid projects. Benton v. Savannah Airport Comm'n, 241 Ga. App. 536, 525 S.E.2d 383 (1999).

Neither the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 et seq., nor the Georgia Relocation Assistance and Land Acquisition Policy Act, O.C.G.A. § 22-4-1 et seq., gave condemnees whose land was subjected to an inadequately described temporary work easement a private right of action. Ga. 400 Indus. Park, Inc. v. DOT, 274 Ga. App. 153, 616 S.E.2d 903 (2005).

22-4-10. Policies guiding acquisition of buildings, structures, and other improvements for federal-aid projects.

In acquiring property for any federal-aid project, the costs of which are financed in whole or in part from federal funds allocated to an acquiring public entity, the acquiring public entity shall be guided by the land acquisition policies relating to buildings, structures, and other improvements specified by Section (302) of the Uniform Act to the greatest extent practicable. (Ga. L. 1973, p. 512, § 9; Ga. L. 1989, p. 213, § 9; Ga. L. 1990, p. 8, § 22.)

The 1989 amendment, effective March 30, 1989, deleted "public works" preceding "project" near the beginning of the introductory language, substituted "Section (302) of the Uniform Act to the greatest extent practicable." for "Section 305(1) of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, Ninety-first Congress, approved January 2, 1971, and shall, to the greatest extent practicable, be guided by the following policies:" at the end of the introductory language, and deleted paragraphs (1) through (3).

The 1990 amendment, effective February 16, 1990, part of an Act to correct errors and omissions in the Code, revised punctuation in this Code section.

22-4-11.1. Exercise of powers granted under this chapter by municipal corporations with population of 350,000 or more; effect of this Code section on other laws.

(a) In addition and supplementary to other powers provided by this chapter for the several public entities, any municipal corporation

having a population of 350,000 or more according to the United States decennial census of 1970 or any future such census may exercise the powers provided by this chapter for public works projects which are not financed in whole or in part from federal funds, but which are financed wholly or in part from the funds of any such municipal corporation or from other nonfederal funding sources, if the governing authority of any such municipal corporation shall first pass an ordinance or resolution stipulating that such funds are to be spent in good faith anticipation of whole or partial reimbursement from federal funds. The costs incurred by any such municipal corporation pursuant to the authority provided by this Code section shall be a part of the costs of public works projects. In carrying out the powers granted under this Code section any such municipal corporation shall be authorized to:

(1) Provide all relocation assistance and payments as authorized by this chapter;

(2) Establish and implement all acquisition policies and practices authorized under this chapter; and

(3) Provide for reimbursement of all necessary expenses authorized under this chapter.

(b) This Code section shall not be construed to repeal or affect in any manner Code Section 32-8-1, relating to relocation assistance for persons displaced by federal-aid highway projects. (Ga. L. 1981, p. 1417, §§ 1, 2; Ga. L. 1991, p. 307, § 1.)

The 1991 amendment, effective April 4, 1991, substituted "350,000" for "400,000" near the beginning of subsection (a).

Editor's notes. — Ga. L. 1991, p. 307, § 2, not codified by the General Assembly, provides for the repeal of Ga. L. 1981, p. 1417.

22-4-15. Authority of public entities to provide replacement housing when federal-aid project cannot proceed to actual construction.

The several public entities shall have the authority, as a last resort, to provide replacement housing when a federal-aid project financed in whole or in part with federal aid cannot proceed to actual construction because no comparable replacement sale or rental housing is available. In carrying out the relocation assistance activities, the several public entities shall be authorized to make payments, construct or reconstruct with their own forces, cause to be constructed or reconstructed, and purchase by deed or condemnation any real property for the purposes of providing replacement housing. The acquiring public entity may exchange, lease, or sell to the displaced person such replacement housing. Whenever any real property has been acquired under this Code section and thereafter the acquiring public entity determines that all or any

part of such property or any interest therein is no longer needed for such purposes because of changed conditions, the acquiring public entity is authorized to dispose of such property or interest therein in accordance with Code Section 50-16-144. (Code 1981, § 22-4-15, enacted by Ga. L. 1989, p. 213, § 10.)

Effective date. — This Code section became effective March 30, 1989.

TITLE 23

EQUITY

Chap.

CHAPTER 1

GENERAL PROVISIONS

23-1-1. Equity jurisdiction — Vested in superior courts.

JUDICIAL DECISIONS

Federal jurisdiction. — Since an action to set aside award of year's support to widow for fraud could be brought in superior courts of the state, it might be brought in federal court, assuming that all other jurisdictional prerequisites had been satisfied. Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982).

State court had jurisdiction over unjust enrichment claim. — State court had jurisdiction to give an award based on the equitable theory of unjust enrichment because the plaintiffs, the buyers of a sports bar, sought only damages against the sellers, not equitable relief. Lee v. Shim, 310 Ga. App. 725, 713 S.E.2d 906 (2011).

Cited in Country Greens Village One Owners Ass'n v. Meyers, 158 Ga. App. 609, 281 S.E.2d 346 (1981); Southeast Serv. Corp. v. Savannah Teachers Props., 263 Ga. App. 513, 588 S.E.2d 310 (2003); Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008).

23-1-3. Equity jurisdiction — Grounds.

JUDICIAL DECISIONS

Equity will grant relief, etc.

In accord with bound volume. See Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. 2008).

Where all relief sought can be obtained in the manner provided for by law, etc.

Equitable relief is inappropriate where an adequate and complete remedy at law in the form of an action in implied assumpsit or quasi-contract was and is available against a party, the record and

the order of the trial court suggest that a money judgment against the party would provide complete relief with respect to him, and the record fails to disclose affirmatively that such a remedy would not be adequate. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

Minor children may bring wrongful death action. — Where a surviving spouse had abandoned his minor children and could not be found, the factual circumstances demand the exercise of the court's equitable powers to preserve the rights of the minor children. The trial court should have allowed these minors, who have no remedy at law, to maintain an action for the wrongful death of their mother. Brown v. Liberty Oil & Ref. Corp., 261 Ga. 214, 403 S.E.2d 806 (1991).

Application of O.C.G.A. § 23-1-3 to the successor liability doctrine. — Corporate debtor that declared Chapter 11 bankruptcy was not liable to an LLC for unpaid rent that was owed by a lock and key company, even though the same individual owned both companies and the debtor had accepted collateral the lock and key company owned in full satisfaction of debt the company owed. The debtor's decision to accept collateral the lock and key company owned in full satisfaction of the company's debt was permitted under O.C.G.A. § 11-9-620 and was not a fraudulent attempt to avoid liabilities the lock and key company owed, the debtor was not a "mere continuation" of the lock and key company, and a contrary conclusion would have elevated form over substance and abridged the equitable principles that were codified in O.C.G.A. § 23-1-3. Acme Sec., Inc. v. CLN Props., LLC (In re Acme Sec., Inc.), 484 B.R. 475 (Bankr. N.D. Ga. 2012).

Courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies. Georgia High Sch. Ass'n v. Waddell, 248 Ga. 542, 285 S.E.2d 7 (1981).

Bond was adequate remedy at law for subcontractor on school project. — When a subcontractor on a school district's high school project had a remedy against the general contractor on the general contractor's performance bond under O.C.G.A. § 36-91-90, this legal remedy was adequate and precluded the subcontractor from asserting an equitable lien against the school district. McArthur Elec., Inc. v. Cobb County Sch. Dist., 281 Ga. 773, 642 S.E.2d 830 (2007).

Adequate remedy at law. — Superior court erred in granting an aunt and uncle custody of minor children because the court lacked subject matter jurisdiction to consider the petition for custody since a probate court had exclusive jurisdiction to issue and revoke letters of testamentary guardianship, and O.C.G.A. § 29-2-4(b) mandated the issuance of letters of testamentary guardianship to the brother of the children's father without notice and a hearing and without consideration of the children's best interests; equity afforded no valid basis for the superior court's exercise of jurisdiction because the aunt and uncle had an appropriate remedy in the probate court to challenge the testamentary guardianship: a petition for revocation or suspension of the brother's letters of testamentary guardianship. Zinkhan v. Bruce, 305 Ga. App. 510, 699 S.E.2d 833 (2010).

Court found no adequate remedy at law. — When an attorney-in-fact sought to enjoin the attorney-in-fact's siblings from enforcing a revocation of their parent's durable health care power of attorney, the attorney-in-fact did not have an adequate remedy at law through appointing an emergency guardian. Under O.C.G.A. § 29-4-14(b)(6), a petition for such an appointment had to set forth that no other person appeared to have authority to act, whereas the attorney-in-fact's position was that the attorney-in-fact did have the authority to act. Luther v. Luther, 289 Ga. App. 428, 657 S.E.2d 574 (2008), cert. denied, No. S08C0912, 2008 Ga. LEXIS 520 (Ga. 2008).

Cited in Cawthon v. Douglas County, 248 Ga. 760, 286 S.E.2d 30 (1982); Brown v. Brown, 265 Ga. 725, 462 S.E.2d 609 (1995).

23-1-4. Effect of legal remedy on exercise of jurisdiction.

JUDICIAL DECISIONS

Equity grants no relief, etc.

Equitable relief is improper if the complainant has a remedy at law which is "adequate," i.e., as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity. Sherrer v. Hale, 248 Ga. 793, 285 S.E.2d 714 (1982).

Equity will grant relief only where there is no available adequate and complete remedy at law. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

Equitable relief is inappropriate where an adequate and complete remedy at law in the form of an action in implied assumpsit or quasi-contract was and is available against a party, the record and the order of the trial court suggest that a money judgment against the party would provide complete relief with respect to him, and the record fails to disclose affirmatively that such a remedy would not be adequate. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

Where subsequent to the court's order of payment of a sum of money into the court registry, the jury awarded a judgment in that amount to plaintiff, as plaintiff had an adequate remedy at law, the equitable relief granted by the trial court was inappropriate. Prosser v. Hancock Bus Sales, Inc., 256 Ga. 399, 349 S.E.2d 460 (1986).

In a breach of contract action between an insurer and an agency, the trial court did not abuse the court's discretion in granting an interlocutory injunction to the agency as, after a balancing of the equities in the agency's favor, the record supported the finding that the insurer conducted itself, to the agency's detriment, as though arbitration of the dispute had been completed and it had been absolved from complying with its post-termination obligations under the underlying agency agreement between the parties. Cotton States Mut. Ins. Co. v. Stephen Brown Ins. Agency, Inc., 290 Ga. App. 660, 660 S.E.2d 445 (2008), cert. denied, No. S08C1321, 2008 Ga. LEXIS 687 (Ga. 2008).

Injunction requiring a bank to pay certain funds into a trial court's registry was inappropriate because a lender had an adequate remedy at law since it could obtain a judgment to completely compensate it for any loss from the bank's removal of funds from a debtor's account. Century Bank of Ga. v. Bank of Am., N.A., 286 Ga. 72, 685 S.E.2d 82 (2009).

An employer whose employee had opened a competing business and taken the employer's trade secrets and confidential information had an adequate and complete remedy at law because it could recover money damages from the employee if the employee removed funds from the employee's competing business that rightfully belonged to the employer. Therefore, under O.C.G.A. §§ 9-5-6 and 23-1-4, a trial court erred in requiring the employee to deposit the business's funds into the registry of the court. Coleman v. Retina Consultants, P.C., 286 Ga. 317, 687 S.E.2d 457 (2009).

A remedy at law, to exclude appropriate relief in equity, must be complete and the substantial equivalent of the equitable relief.

In a case arising from a mortgage fraud scheme, the government unsuccessfully argued that a title insurance company was not entitled to a constructive trust because it had an adequate remedy at law based on the Attorney General's authority, pursuant to 21 U.S.C. § 853(i)(1), to remit a forfeiture in the interest of justice. Not only was the § 853(i)(1) remission a non-judicial remedy left entirely to the discretion of the Attorney General, but under O.C.G.A. § 23-1-4, equitable remedies, such as constructive trusts, were not precluded by the existence of an alternate remedy that was not as complete or effectual as the equitable relief. United States v. Shefton, 548 F.3d 1360 (11th Cir. 2008).

Rezoning must be sought before constitutionality of ordinance considered. — Before litigants seek declaration by court of equity that zoning ordinance is unconstitutional as applied to their property, they must apply to the

local authorities for relief by rezoning. Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

Time limit on filing suit challenging zoning ordinance. — Not only is application for rezoning a prerequisite to filing suit in equity seeking declaration that zoning ordinance is unconstitutional, but, after application for rezoning is denied by governing authority, any suit in equity attacking zoning ordinance as applied to property involved is time barred when no suit challenging zoning classification is filed within 30 days of that decision. Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

Restrictive covenant cases. — An injunction will lie in restrictive covenant cases by employers against former employees even where damages are also sought. National Settlement Assocs. v. Creel, 256 Ga. 329, 349 S.E.2d 177 (1986).

Bond was adequate remedy at law for subcontractor on school project. — When a subcontractor on a school district's high school project had a remedy against the general contractor on the general contractor's performance bond under O.C.G.A. § 36-91-90, this legal remedy was adequate and precluded the subcontractor from asserting an equitable lien against the school district. McArthur Elec., Inc. v. Cobb County Sch. Dist., 281 Ga. 773, 642 S.E.2d 830 (2007).

Cited in Liniado v. Alexander, 199 Ga. App. 256, 404 S.E.2d 602 (1991); Mayor & Council v. Hall, 261 Ga. 681, 410 S.E.2d 105 (1991); Powell v. City of Snellville, 266 Ga. 315, 467 S.E.2d 540 (1996); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 502 S.E.2d 806 (1998); McBride v. Life Ins. Co., 190 F. Supp. 2d 1366 (M.D. Ga. 2002); Paine v. Nations, 301 Ga. App. 97, 686 S.E.2d 876 (2009); Sanders v. Riley, No. S14A1314, 2015 Ga. LEXIS 178 (Mar. 16, 2015).

23-1-5. Concurrent jurisdiction of law and equity.

JUDICIAL DECISIONS

Cited in Benefield v. Martin, 276 Ga. App. 130, 622 S.E.2d 469 (2005); Long v. Long, 303 Ga. App. 215, 692 S.E.2d 811 (2010).

23-1-6. Nature of equity — Follows the law.

JUDICIAL DECISIONS

Challenge to zoning ordinance treated as appeal or certiorari for time limit purposes. — Although suit in equity to declare zoning ordinance unconstitutional as applied to certain property is not an appeal either in form or in substance, it is nonetheless appropriate to treat it as an appeal or petition for certiorari when considering time constraints on its filing lest requirement of exhaustion be rendered wholly meaningless in that facts have completely changed since rezoning application was denied. Village Ctrs., Inc. v. DeKalb County, 248 Ga. 177, 281 S.E.2d 522 (1981).

Cited in Miles v. Andress, 229 Ga. App. 86, 493 S.E.2d 233 (1997); Vincent v. Longwater, 245 Ga. App. 516, 538 S.E.2d 164 (2000).

23-1-7. Nature of equity — Seeks to do justice.

JUDICIAL DECISIONS

Equity seeks to do full justice but must do so within the parameters of the law; therefore, a temporary restraining order that acknowledged that students had no legal right to participate in graduation ceremony but ordered that they be allowed to do so anyway, so as to "do the right thing," was in error. Dolinger v. Driver, 269 Ga. 141, 498 S.E.2d 252 (1998).

Cited in Dunaway v. Clark, 536 F. Supp. 664 (S.D. Ga. 1982); Brown v. Brown, 265 Ga. 725, 462 S.E.2d 609 (1995); Smith v. Gwinnett County, 268 Ga. 179, 486 S.E.2d 151 (1997).

23-1-8. Nature of equity — Considers done what ought to be done.

Law reviews. — For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006).

JUDICIAL DECISIONS

Equitable relief available under an indemnity contract. — Where the Chapter 11 debtor's officer settled a lawsuit against the debtor and the officer without informing the debtor's successor of the settlement, as equitable relief under O.C.G.A. § 23-1-8, the officer was reimbursed under an indemnification clause only for an amount the debtor had previously authorized for settlement. In re First Am. Health Care of Ga., Inc., 288 B.R. 598 (Bankr. S.D. Ga. 2002).

Determining beneficiary under pension plan. — Because a city employee asked for and completed forms given to the employee by the city's human resources department to change the beneficiary of the employee's retirement plan to the employee's brother, but was not given the correct form for that change by the human resources department, a trial court properly used its equity power to hold that the brother was entitled to the benefit. Westmoreland v. Westmoreland, 280 Ga. 33, 622 S.E.2d 328 (2005).

In pari delicto. — Georgia law follows the well-settled maxim that equity seeks to do equity, O.C.G.A. § 23-1-8, and the equitable doctrine of in pari delicto is based on the principle that to give the plaintiff relief would contravene public morals and impair the good of society; hence, it should not be applied in a case in which to withhold relief would, to a greater extent, offend public morals. Hays v. Paul, Hastings, Janofsky & Walker LLP, No. 1:06-CV-754-CAP, 2006 U.S. Dist. LEXIS 95849 (N.D. Ga. Sept. 14, 2006).

Cited in Prince v. Black, 256 Ga. 79, 344 S.E.2d 411 (1986); Brown v. Brown, 265 Ga. 725, 462 S.E.2d 609 (1995).

23-1-10. Who would have equity must do equity.

JUDICIAL DECISIONS

Analysis

General Consideration
Pleading and Practice

General Consideration

One with unclean hands cannot obtain relief in equity.

Worker could not contend that equity should forbid the employer from asserting the worker's illegal status, based on the employer's failure to require that the worker complete the U.S. Department of Justice, Bureau of Immigration and Customs Enforcement Employment Eligibility Verification Form, since the worker filled out an employment application and provided the employer with a Social Security number which belonged to someone else. Martines v. Worley & Sons Constr., 278 Ga. App. 26, 628 S.E.2d 113 (2006).

Unclean hands shown. — In a post-divorce proceeding, a trial court did not err in refusing to hold a mother in contempt and by finding that the father came to court with unclean hands because the evidence showed that the mother did not obtain certain medical evaluations and treatments for the parties' children as previously ordered because the father had not paid child support, had not paid one-half of the medical expenses already incurred for the children, and the children's doctor refused to see the children anymore due to the father's belligerent conduct toward the doctor and staff, thus, the father did have unclean hands for failing to pay the expenses and by the conduct toward the doctor. Higdon v. Higdon, 321 Ga. App. 260, 739 S.E.2d 498 (2013).

Father who caused property to be transferred to his son to shield the property from the father's creditors was not entitled to judgment against the son because he had unclean hands, under O.C.G.A. § 23-1-10. Under O.C.G.A. § 18-2-74(a)(1), the transfer was fraudulent because the transfer was made with actual intent to hinder, delay, or defraud the father's creditors. Roach v. Roach, 327 Ga. App. 513, 759 S.E.2d 587 (2014).

Inapplicable to action at law. — Equitable doctrine of unclean hands had no application to an action at law, and, in a suit seeking to recover on three promissory notes, a trial court was not authorized to reduce the amounts shown to be due and payable on the notes on account of its finding of unclean hands. Park v. Fortune Ptnr., Inc., 279 Ga. App. 268, 630 S.E.2d 871 (2006).

Relationship between acts required. — Under Georgia law, the unclean hands doctrine does not attach to all prior bad acts. There must be a direct relationship between the equitable relief sought and the acts giving rise to the unclean hands. ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994).

In a diversity contract dispute any relationship between the destruction of personal files on computer and software developer's equitable claims concerning Medicare reimbursements was merely tangential and would not support dismissal of developer's equitable counterclaims on the basis of unclean hands. ABC Home Health Servs., Inc. v. IBM Corp., 158 F.R.D. 180 (S.D. Ga. 1994).

The rule that he who would have equity, etc.

The unclean hands maxim applies to equitable rights which relate directly to the cause of action; it does not embrace matters outside the subjectmatter of the action. Adams v. Crowell, 157 Ga. App. 576, 278 S.E.2d 151 (1981); Zappa v. Automotive Precision Mach., Inc., 205 Ga. App. 584, 423 S.E.2d 286 (1992).

In an action for specific performance, although it was found that plaintiff's indebtedness had not been completely discharged, the clean hands doctrine did not apply because the court also found that plaintiff was unaware of the existence or amount of the arrearages until defendant testified about them at trial. Dobbs v. Dobbs, 270 Ga. 887, 515 S.E.2d 384 (1999).

Enforcement of third party rights. — A plaintiff with unclean hands who has proper standing may still bring an action to enforce the rights of others and secure relief on their behalf, even though doing so may result in an indirect benefit to the unclean plaintiff. West v. West, 825 F. Supp. 1033 (N.D. Ga. 1992).

Where husband deeded land to former wife in order to avoid any alimony claim against it by his second wife, doctrine of unclean hands barred husband's suit seeking to compel former wife to reconvey land to him on theory that she

committed fraud on him in obtaining the deeds to the land. Williams v. Williams, 255 Ga. 264, 336 S.E.2d 244 (1985).

Not applicable where subject matter is marriage, not divorce. — Since the "subject matter" and "transaction concerning which relief is sought" was marriage between the parties, not a divorce action, application of the unclean hands doctrine was erroneous. Pryor v. Pryor, 263 Ga. 153, 429 S.E.2d 676 (1993).

Not applicable to child custody cases. — Maxim of unclean hands was inapplicable to child custody case, and, in any event, the father acted in good faith picking up the child after receiving a telephone call from the home of the grandmother. Lynch v. Horton, 302 Ga. App. 597, 692 S.E.2d 34 (2010), cert. denied, U.S. , 131 S. Ct. 2447, 179 L. Ed. 2d 1210 (2011).

Real estate contracts. — Property owners were entitled to specific performance under O.C.G.A. § 23-2-130 of a settlement agreement by which a seller agreed to re-purchase their property for $1 million. The fact that the owners allegedly attempted to have a third party business avoid its separate contractual obligation owed to the seller did not relate to the enforcement of the settlement agreement and could not bar specific performance of the owners' contract with the seller. Hampton Island, LLC v. HAOP, LLC, 306 Ga. App. 542, 702 S.E.2d 770 (2010).

Quiet title action. — Trial court did not err in refusing to deny property owners' petition to quiet title due to unclean hands because adjoining landowners used a street for activities other than ingress and egress only occasionally, and there was no evidence that the owners observed those other uses on the owners two or three visits to the property prior to purchasing the property. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Cited in Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790 (1983); Murawski v. Roland Well Drilling, Inc., 188 Ga. App. 760, 374 S.E.2d 207 (1988); Holland Elec., Heating & Plumbing Co. v. Holland Heating & Air Conditioning, Inc., 259 Ga. 256, 379 S.E.2d 404 (1989); Dixon v. Murphy, 259 Ga. 643, 385 S.E.2d 408 (1989); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 502 S.E.2d 806 (1998); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001); Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC, 262 Ga. App. 457, 585 S.E.2d 643 (2003); Bishop Eddie Long Ministries, Inc. v. Dillard, 272 Ga. App. 894, 613 S.E.2d 673 (2005); Wyatt Processing, LLC v. Bell Irrigation Inc., 298 Ga. App. 35, 679 S.E.2d 63 (2009).

Pleading and Practice

Unclean hands not shown. — Plaintiff (1) did not lack clean hands in a suit wherein plaintiff successfully obtained a permanent injunction against defendant from engaging in a commercial business on defendant's residential property, and (2) did not violate the restrictive covenant by engaging in court reporting work on a home computer and receiving business mail at plaintiff's residence because such activities did not increase the traffic in the subdivision and did not have any effect on the value, status, stability, and residential character of plaintiff's home or the subdivision, unlike defendant's parking of cement trucks and other commercial vehicles at defendant's home. Roberts v. Lee, 289 Ga. App. 714, 658 S.E.2d 258 (2008).

23-1-11. Effect of equal equities; effect of unequal equities.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Superior equity entitled to relief. — Where, considering all the facts presented in the case, the equities in favor of lot owners were superior to those of a county,

the trial court abused its discretion in ordering equitable relief permitting the county to disconnect water service to the subdivision. Cantrell v. Henry County, 250 Ga. 822, 301 S.E.2d 870 (1983).

23-1-14. Who bears loss from act of third party.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Conversion cases. — The principle stated in this Code section is applicable in conversion cases. Atlanta Classic Cars, Inc. v. Chih Hung USA Auto Corp., 209 Ga. App. 908, 439 S.E.2d 498 (1993).

When items stolen from an electric company were sold to a supply company, the electric company was not entitled to summary judgment on its conversion claim against the supply company and its principal, because of the equitable doctrine codified at O.C.G.A. § 23-1-14, providing that, when one of two innocent persons must suffer by the act of a third person, the individual who put it in the power of the third person to inflict the injury shall bear the loss, as there were genuine fact issues as to whether the principal was innocent and whether the electric company's inattentiveness allowed its employee to steal the items with impunity. Fed. Ins. Co. v. Westside Supply Co., 264 Ga. App. 240, 590 S.E.2d 224 (2003).

Liability of auctioneer for conversion. — The liability of an auctioneer for conversion does not extend to a case in which it is the true owner who originally enabled the auctioneer's principal to commit the underlying conversion and the auctioneer subsequently acts without knowledge of his principal's conversion. Benton v. Duvall Livestock Mktg., Inc., 201 Ga. App. 430, 411 S.E.2d 307 (1991).

Liability generally.

Equity required that as between the lender and the companies, the companies had to bear the loss for any alleged fraud by their agents. R.W. Holdco, Inc. v. SCI/RW Holdco, Inc., 250 Ga. App. 414, 551 S.E.2d 826 (2001).

By failing to file a lien, the pawnbroker enabled the automobile owners to perpetrate the fraud and must, therefore, bear the loss pursuant to this section. Cobb Ctr. Pawn & Jewelry Brokers, Inc. v. Gordon, 242 Ga. App. 73, 529 S.E.2d 138 (2000).

No legal duty by franchisor to consumer. — In a suit brought by a customer asserting conversion against an automobile franchisor and its financial company, the trial court properly granted summary judgment to the franchisor and the financial company as the business entities owned no legal duty to the consumer to prevent the franchisee from presenting an unreasonable risk of harm to the customer. As such, the customer could not predicate liability for conversion under O.C.G.A. § 23-1-14 as a matter of law. DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

Cited in Palmer v. Forrest, Mackey & Assocs., 251 Ga. 304, 304 S.E.2d 704 (1983); Bank of Danielsville v. Seagraves, 167 Ga. App. 135, 305 S.E.2d 790 (1983); Lamb v. Thalimer Enters., Inc., 193 Ga. App. 70, 386 S.E.2d 912 (1989); Brinkley v. Bosch Olds-Buick-GMC, Inc., 199 Ga. App. 663, 405 S.E.2d 883 (1991); Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Equitable Estoppel

Equitable estoppel.

In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's claim that it was entitled, under equitable estoppel provided in O.C.G.A. § 23-1-14, to rely on the incorrect contract price stated in the provider's notice to contractor failed; the provider's statutory notice

to contractor was not what put the subcontractor in a position to fail to complete its work or to fail in paying the provider for materials, which was the basis of the claim against the payment bond. Sierra Craft, Inc. v. T. D. Farrell Constr., Inc., 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, No. S07C0460, 2007 Ga. LEXIS 145 (Ga. 2007).

23-1-15. Where both parties equally at fault; where fault is unequal.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Equal Fault
Illustrative Cases

General Consideration

When both parties are at fault. — O.C.G.A. § 23-1-15, states that when both parties are equally at fault, equity will not interfere but will leave them where it finds them. The rule is otherwise if the fault of one decidedly overbalances that of the other. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013).

Cited in Holmes v. Henderson, 274 Ga. 8, 549 S.E.2d 81 (2001).

Equal Fault

In fraudulent transactions equity leaves both parties just as it finds them.

If two parties engage in a fraudulent transfer and are in pari delicto, equity will leave the parties where it finds them. Laxton v. Laxton, 234 Ga. App. 221, 507 S.E.2d 146 (1998).

Equal fault rule not applicable when questions of fact present. — In a negligence and breach of trust action, because there were questions of fact about the relative fault of each party the equity maxim of when two parties are equally at fault, one may not recover from the other did not apply. Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013).

Illustrative Cases

No claim to nonjudicial foreclosure sale. — The son had no claim to the proceeds of a nonjudicial foreclosure sale conducted by his father, where he had executed a promissory note and deed to his father for the express purpose of delaying, hindering, or defrauding a potential judgment creditor, and thus had unclean hands, and the evidence showed that the proceeds did not exceed the amount of the promissory note, interest, advertising costs, and attorney fees. Laxton v. Laxton, 234 Ga. App. 221, 507 S.E.2d 146 (1998).

23-1-16. Taking with notice of equity.

JUDICIAL DECISIONS

Construction with O.C.G.A. § 23-6-64. — Findings entered by a special master, which determined that the disputed portion of an alley belonged to a landowner, and not the neighbors, by operation of the landowner's prior recorded

deed, was not clearly erroneous, as: (1) the landowner received the property via a valid deed; (2) the neighbors failed to put the landowner on notice of their claim; and (3) the neighbors' claim of possession and use was insufficient. Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

Notice of restrictive covenant. — Successor landowners were liable for breach of a restrictive covenant because, as buyers, they were charged with notice of the covenant in a recorded agreement, which required them to build a fence upon development of the property. Lesser v. Doughtie, 300 Ga. App. 805, 686 S.E.2d 416 (2009).

Cited in Bacote v. Wyckoff, 251 Ga. 862, 310 S.E.2d 520 (1984); Southeast Toyota Distribs., Inc. v. Fellton, 212 Ga. App. 23, 440 S.E.2d 708 (1994).

RESEARCH REFERENCES

ALR. — Check given in land transaction as sufficient writing to satisfy statute of frauds, 9 ALR4th 1009.

23-1-17. Scope of notice; ignorance due to negligence.

Law reviews. — For article, "A Comprehensive Analysis of Georgia RICO", see 9 Ga. St. U.L. Rev. 537 (1993). For article, "Noticing the Bankruptcy Sale: The Purchased Property May Not Be as 'Free and Clear of All Liens, Claims and Encumberances' as You Think," see 15 (No. 5) Ga. St. B.J. 12 (2010). For article, "Eleventh Circuit Survey: January 1, 2013 — December 31, 2013: Casenote: The Decline and Fall of Constructive Notice," see 65 Mercer L. Rev. 1203 (2014).

JUDICIAL DECISIONS

Analysis

General Consideration

Construction with O.C.G.A. § 23-6-64. — Findings entered by a special master, which determined that the disputed portion of an alley belonged to a landowner, and not the neighbors, by operation of the landowner's prior recorded deed, was not clearly erroneous, as: (1) the landowner received the property via a valid deed; (2) the neighbors failed to put the landowner on notice of their claim; and (3) the neighbors' claim of possession and use was insufficient. Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

Cited in Palmetto Capital Corp. v. Smith, 284 Ga. App. 819, 645 S.E.2d 9 (2007); Wells Fargo Bank, N.A. v. Gordon, 292 Ga. 474, 749 S.E.2d 368 (2013).

Scope of Notice

Effect of notice sufficient to excite attention.

Lease between a debtor and a county, which was recorded in county records, was properly attested, and contained a full legal description of real property, and which referred to a trust indenture 27 times, provided constructive notice to a bona fide purchaser of the unrecorded indenture and the mortgage lien it created and gave rise to a duty to inquire further, which would have lead to discovery of the unrecorded lien. Thus, because the mortgage lien was enforceable against a bona fide purchaser under Georgia law, it was not avoidable by a Chapter 11 trustee or a debtor in possession. Detention Mgmt.,

LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

Effect of unattested signature. — Trustee could not avoid a creditor's security interests under 11 U.S.C. § 544 because a security deed provided constructive notice of the creditor's interest in the properties despite the fact that the nondebtor wife's signature was not attested in compliance with Georgia law. MacArthur v. Am. Gen. Fin. Servs. (In re MacArthur), 430 B.R. 300 (Bankr. N.D. Ga. 2010).

One claiming title to lands is chargeable with notice of every matter which appears in his deed, etc.

That a recorded security deed from a grantor to the grantee contained an incorrect land lot designation did not mean that a mortgagee of the property was not on notice of the deed under O.C.G.A. § 44-2-2(b) because the incorporation of the subdivision plat in the deed provided a key to locating the property. Therefore, the grantee's deed was valid. Deljoo v. SunTrust Mortg., Inc., 284 Ga. 438, 668 S.E.2d 245 (2008).

Constructive and inquiry notice. — Purchasers of land are charged with constructive notice of recorded instruments and also recognizes the concept of inquiry notice. For a discussion of the balance between these concepts, see Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Validation order issued by a superior court authorizing a county to incur indebtedness did not give notice to a purchaser of the existence of a trust indenture or any interest of a bond trustee in real property as a matter of constructive or inquiry notice as a title examiner did not have to investigate pleadings and orders in litigation in which the seller of property was a party. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

Inquiry notice. — Where a Chapter 7 debtor purchased a home and paid off a bank's existing security interest with funds borrowed from a creditor, the creditor's security deeds, which were recorded along with the debtor's warranty deed several weeks after the closing of the home purchase and the creditor's loan, were perfected at the time they were executed and delivered within the meaning of 11 U.S.C. § 547(e)(1)(A) because a bona fide purchaser would have had inquiry notice of them at all times prior to their recordation based on the debtor's absence of record title and the existence of the cancelled security deed on the property in favor of the bank. Watts v. Argent Mortg. Co., LLC (In re Hunt), No. 04-77191-PWB, 2007 Bankr. LEXIS 1020 (Bankr. N.D. Ga. Feb. 23, 2007).

In a case in which a Chapter 7 trustee sought to avoid two security deeds the debtor gave to a mortgage company on the ground that the security interests were made within 90 days of the filing of the debtor's bankruptcy case and were therefore avoidable under 11 U.S.C. § 547(b)(4)(A), the trustee failed. The mortgage company's security deeds were perfected from July 14, 2004, the date a hypothetical bona fide purchaser would have had such notice, as set forth in O.C.G.A. § 23-1-17, and the date of perfection was within 10 days of the date of the transfer of property; accordingly, the transfer was made before the 90-day reachback period commenced on July 20, 2004, and the trustee could not avoid the deeds. Watts v. Argent Mortg. Co., LLC (In re Hunt), No. 07-14615, 2008 U.S. App. LEXIS 25653 (11th Cir. Dec. 18, 2008) (Unpublished).

Owner of property adjacent to a bankruptcy debtor's private airport had an express easement to use the airport, even though the easement was not recorded until after the debtor purchased the airport, since the debtor had sufficient notice of the easement through visible indications such as taxiways and roads and the owner's use of the airport. Flyboy Aviation Props., LLC v. Franck, 501 B.R. 808 (Bankr. N.D. Ga. 2013).

Under Georgia law, a fixture filing contained sufficient information to put a purchaser on notice of the existence of a bond trustee's prior unrecorded interest in the real property under an indenture, and the references in the fixture filing to the assignment and pledge of the debtor's interest would excite the attention of a pur-

Scope of Notice (Cont'd)

chaser and trigger the duty to inquire further into the interest held by the bond trustee. That inquiry would include an examination of the indenture that would give the purchaser notice of the bond trustee's mortgage and, thus, the mortgage lien was enforceable against a bona fide purchaser, and the mortgage lien was not avoidable under the Bankruptcy Code. Detention Mgmt., LLC v. UMB Bank, NA (In re Mun. Corr., LLC), 501 B.R. 119 (Bankr. N.D. Ga. 2013).

No duty to inquire arose. — In a declaratory judgment action brought by the purchasers of certain real property to remove a cloud from the purchasers' title asserted by a bank who had obtained a writ of fieri facias (the lien) against one of the sellers, the trial court erred by granting summary judgment to the bank and holding that the purchasers had a duty to inquire as to prior names used by that seller. The purchasers provided expert testimony that the lien using that seller's married name had not been recorded and, in turn, the bank failed to present any evidence to dispute the affidavits of the purchasers' witnesses or to cite to any authority which imposed a duty on the purchasers or the purchasers' agents to investigate prior or alternative names of that seller when nothing occurred prior to or during the closing that created a duty to inquire and that seller had falsely sworn under oath that the property was not subject to any encumbrances or liens and that there were no outstanding judgments. Gallagher v. Buckhead Cmty. Bank, 299 Ga. App. 622, 683 S.E.2d 50 (2009), cert. denied, No. S09C2080, 2010 Ga. LEXIS 2 (Ga. 2010).

Chapter 7 trustee was a bona fide purchaser for value as of the petition date under Georgia law as no security deed was of record in the debtors' chain of title and there was nothing in the record to put the trustee on inquiry notice of the existence of a bank's unrecorded security deed and, thus, the trustee could avoid the bank's security deed under 11 U.S.C. § 544(a)(3) and recover the property for the benefit of the estate under 11 U.S.C. § 550. The court rejected the bank's argument that the bank should be equitably subrogated to the rights of a prior lender whose loan was satisfied by the bank's loan because even if the bank was correct, a subrogee could have no greater rights than the party to whose rights it was subrogated, and the lender cancelled the lender's security deed prior to the petition date so that any subrogated rights of the bank were terminated at the same time. Ogiers v. Wells Fargo Bank, N.A. (In re Phillips), 465 B.R. 336 (Bankr. N.D. Ga. 2012).

Although a county failed to comply with O.C.G.A. § 36-9-2 by recording a transfer in the minutes when the county conveyed the county's interest in property the county had formerly acquired by eminent domain to the county development authority, a subsequent purchaser was a bona fide purchaser without notice of this irregularity under O.C.G.A. § 23-1-20. Knowledge of the county's ownership was insufficient to excite inquiry. Darling Int'l, Inc. v. Carter, 294 Ga. 455, 754 S.E.2d 347 (2014).

Notice of need to confirm guardian's authority to convey children's interest. — Trial court did not err in denying purchasers and the holders of two outstanding security deeds bona fide purchaser status because a quitclaim deed showed on the deed's face that a parent signed the deed as the children's purported "guardian"; thus, the designation of a "guardian" in the chain of title put the purchasers and holders on notice of the need to confirm the parent's legal authority to convey the children's interest in the property. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743 (2012).

Knowledge chargeable to a party, after he is put on notice, extends to such knowledge as diligent inquiry would have disclosed. Howell v. United States, 519 F. Supp. 298 (N.D. Ga. 1981).

Once prospective purchaser of property finds person in actual, open, visible, exclusive, and unambiguous possession of the property, he has an affirmative duty to inquire of the possessor concerning his rights in the premises and as a consequence of his failure to do so, he may not prevail as a purchaser for value without notice. Bacote v.

Wyckoff, 251 Ga. 862, 310 S.E.2d 520 (1984).

Chapter 7 trustee was not entitled to sell a debtor's property because the trustee was not a bona fide purchaser without notice; an examination of the deed book and page numbers used in transfers and assignments would have alerted a hypothetical purchaser to the uncertainty concerning the status of both assignees' interest in the property. The trustee's powers under 11 U.S.C. § 544(a)(3) did not cut off the first assignee's rights to seek reformation of the mistakenly cancelled first deed because the second assignee's quitclaim release of the instrument assigned to the first assignee was sufficient to constitute notice that would excite attention and put a party on inquiry under O.C.G.A. § 23-1-17. Household Fin. Servs. v. Neighbors (In re Neighbors), No. 06-6008, 2006 Bankr. LEXIS 4653 (Bankr. S.D. Ga. Oct. 11, 2006).

Negligence

And equity will not relieve, etc.

One failing to inform himself, but having equal opportunity of learning the truth, must suffer the consequences of his neglect. Rustin Stamp & Coin Shop, Inc. v. Ray Bros. Roofing & Sheet Metal Co., 175 Ga. App. 30, 332 S.E.2d 341 (1985).

Where purchaser was under constructive notice as to the legal description of his own deed, which incorporated the recorded plat by reference, and as to the ownership of the lot he believed he was buying but that was owned by another, his failure to conduct a title examination was the sole proximate cause of injuries and his negligence action was barred. Reidling v. Holcomb, 225 Ga. App. 229, 483 S.E.2d 624 (1997).

23-1-18. Pending action as notice; effect on purchaser.

JUDICIAL DECISIONS

Analysis

General Consideration

This section did not apply to an action in which purchasers of a farm sued their vendor's former partner to recover horses that the former partner was awarded in a lawsuit against the vendor and which the former partner obtained as the result of a levy on the judgment. Russell v. Lawrence, 234 Ga. App. 612, 507 S.E.2d 161 (1998).

Doctrine of Lis Pendens

2. Application of Doctrine

Restrictive covenants. — A lis pendens notice stating a claim to a contract right to buy certain lots in a subdivision serves as notice to future purchasers of other lots in the subdivision that the lots described in the lis pendens notice are not encumbered by restrictive covenants recorded after the contract but before the sale of the other lots. Puryear v. Deakins, 258 Ga. 618, 373 S.E.2d 15 (1988).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 17 Am. Jur. Pleading and Practice Forms, Lis Pendens, § 3.

23-1-19. Sale to one without notice; sale by one without notice.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Bona fide purchaser obtains good title notwithstanding forgery in chain of title. — Bonner v. Norwest Bank Inc., 275 Ga. 620 (2002), is inconsistent with the Second Refuge Church Inc. v. Lollar, 282 Ga. 721 (2007), line of cases and is overruled to the extent that the case extends the bona fide purchaser for value doctrine to those acquiring title under a grantee in a forged deed; Mabra v. Deutsche Bank Inc., 277 Ga. App. 764, (2006), is likewise overruled as Mabra also runs contrary to the Lollar line of cases, which does not recognize that the bona fide purchaser for value doctrine may apply when forgery occurs between spouses. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

Cited in DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Anderson v. Streck, 190 Ga. App. 224, 378 S.E.2d 526 (1989); Dime Savs. Bank v. Sandy Springs Assocs., 261 Ga. 485, 405 S.E.2d 491 (1991); Farris v. Nationsbanc Mtg. Corp., 268 Ga. 769, 493 S.E.2d 143 (1997).

Sale to One Without Notice

Sale of real estate to innocent purchaser divests title of heirs. — Superior court did not err in granting a purchaser summary judgment in an administrator's action alleging that the purchaser aided and abetted an executor's breach of fiduciary duties when it bought properties from the executor but did not meet its burden of proving payment merely by producing recitations of the alleged consideration; the probate court's order authorizing the executor to disburse estate property was valid on its face, the sale did not violate the terms of the power of sale in a testatrix's will, and the sale of real estate to an innocent purchaser divested the title of the heirs, although there could be irregularities. Witcher v. JSD Props., LLC, 286 Ga. 717, 690 S.E.2d 855 (2010).

Impact of forgery upon bona fide purchaser. — Trial court erred in holding that a mortgage company had a valid security interest as to the other one-half undivided interest in certain property because the company could not acquire a valid security interest in the entire property by virtue of the company's status, if any, as a bona fide purchaser for value; a bona fide purchaser for value, or a security deed holder occupying such position, obtains good title notwithstanding a forgery in the chain of title. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

A 2003 warranty deed that operated to release a prior lender's security interest in the property was not a forgery but was signed by someone fraudulently assuming the authority of an officer of the prior lender and was regular on the deed's face. Therefore, a subsequent lender that foreclosed on the property and purchased the property at the foreclosure sale was a bona fide purchaser for value entitled to take the property free of the prior lender's security interest. Deutsche Bank Nat'l Trust Co. v. JP Morgan Chase Bank, N.A., 307 Ga. App. 307, 704 S.E.2d 823 (2010).

Purchasers entitled to protection of bona fide purchaser for value. — There was no error in the trial court's grant of summary judgment to a bank and nursery in a daughter's action to cancel deeds executed by her mother before her death to the bank and the nursery because they were entitled to the protection of bona fide purchaser for value under O.C.G.A. §§ 23-1-19 and 23-1-20; the title search showed that the property was transferred to the mother via the will of the daughter's father through a trustees deed of distribution from the remainder

trust to the primary beneficiary of the trust, and there was nothing in the chain of title or the trust instruments that would put either the bank or nursery on notice that there were any issues affecting title to the properties because the wording of the trusts allowed the trustees to sell or dispose of any property, at any time, for reasons the trustees deemed best, for the benefit of the mother. Kitchings v. Ameris Bank, 309 Ga. App. 837, 711 S.E.2d 392 (2011).

23-1-20. Interference with bona fide purchaser.

Law reviews. — For note, "Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in Levenson?," see 45 Ga. L. Rev. 877 (2011).

JUDICIAL DECISIONS

Bona fide purchaser obtains good title notwithstanding forgery in chain of title. — Trial court erred in holding that a mortgage company had a valid security interest as to the other one-half undivided interest in certain property because the company could not acquire a valid security interest in the entire property by virtue of the company's status, if any, as a bona fide purchaser for value; a bona fide purchaser for value, or a security deed holder occupying such position, obtains good title notwithstanding a forgery in the chain of title. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

Bonner v. Norwest Bank Inc., 275 Ga. 620 (2002), is inconsistent with the Second Refuge Church Inc. v. Lollar, 282 Ga. 721 (2007), line of cases and is overruled to the extent that the case extends the bona fide purchaser for value doctrine to those acquiring title under a grantee in a forged deed; Mabra v. Deutsche Bank Inc., 277 Ga. App. 764 (2006), is likewise overruled as Mabra also runs contrary to the Lollar line of cases, which does not recognize that the bona fide purchaser for value doctrine may apply when forgery occurs between spouses. Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010).

A bona fide purchaser without notice acquires, etc.

In accord with bound volume. See Jenkins v. Sosebee, 74 Bankr. 440 (Bankr. N.D. Ga. 1987).

Bona fide purchaser not found when purchased with notice of quiet title action. — Investment company was not entitled to the protection accorded to bona fide purchasers because the company admitted that the company had actual knowledge of the quiet title action filed by a bank as well as the recorded lis pendens before purchasing the subject property at a foreclosure sale; because a grantee's security deed was recorded with the maturity date clearly set forth, the company was on constructive notice that the date of the reversion of the title interest, pursuant to O.C.G.A. § 44-14-80(a)(1), had occurred before the foreclosure sale. MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Purchasers entitled to protection of bona fide purchaser for value. — There was no error in the trial court's grant of summary judgment to a bank and nursery in a daughter's action to cancel deeds executed by her mother before her death to the bank and the nursery because they were entitled to the protection of bona fide purchaser for value under O.C.G.A. §§ 23-1-19 and 23-1-20; the title search showed that the property was transferred to the mother via the will of the daughter's father through a trustees deed of distribution from the remainder trust to the primary beneficiary of the trust, and there was nothing in the chain of title or the trust instruments that would put either the bank or nursery on notice that there were any issues affecting title to the properties because the wording of the trusts allowed the trustees to sell or dispose of any property, at any time, for reasons the trustees deemed best, for the

benefit of the mother. Kitchings v. Ameris Bank, 309 Ga. App. 837, 711 S.E.2d 392 (2011).

Although a county failed to comply with O.C.G.A. § 36-9-2 by recording a transfer in the minutes when the county conveyed the county's interest in property the county had formerly acquired by eminent domain to the county development authority, a subsequent purchaser was a bona fide purchaser without notice of this irregularity under O.C.G.A. § 23-1-20, so that the county's title was superior to that of the condemnee's heirs, who sought to repurchase the property under O.C.G.A. § 36-9-3(g)(3)(B). Darling Int'l, Inc. v. Carter, 294 Ga. 455, 754 S.E.2d 347 (2014).

Bona fide purchaser status properly denied. — Trial court did not err in denying purchasers and the holders of two outstanding security deeds bona fide purchaser status because a quitclaim deed showed on the deed's face that a parent signed the deed as the children's purported "guardian"; thus, the designation of a "guardian" in the chain of title put the purchasers and holders on notice of the need to confirm the parent's legal authority to convey the children's interest in the property. Chase Manhattan Mortg. Corp. v. Shelton, 290 Ga. 544, 722 S.E.2d 743 (2012).

Cited in DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Anderson v. Streck, 190 Ga. App. 224, 378 S.E.2d 526 (1989); Dime Savs. Bank v. Sandy Springs Assocs., 261 Ga. 485, 405 S.E.2d 491 (1991); Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257 (1992); Farris v. Nationsbanc Mtg. Corp., 268 Ga. 769, 493 S.E.2d 143 (1997).

23-1-22. Interference with creditor.

JUDICIAL DECISIONS

Remedy not "needlessly" interfered with. — O.C.G.A. § 23-1-22 did not provide grounds for refusing to allow a debtor corporation to assert an alter ego cause of action against its former principal or for allowing a creditor to bring an alter ego action against the former principal in state court as the creditor's chosen remedy was interfered with only because, in bankruptcy, all unsecured creditors with like claims were to be treated equally. Baillie Lumber Co. v. Thompson, 279 Ga. 288, 612 S.E.2d 296 (2005).

23-1-23. Construction of conditions; relief against forfeitures.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Lease provision requiring lessor to modify building in accordance with blueprint and city requirements was a covenant, and not words of condition; and the remedy for a breach was an action for damages, and not a forfeiture of the estate for condition broken. Fulton County v. Collum Properties, Inc., 193 Ga. App. 774, 388 S.E.2d 916 (1989).

23-1-25. Laches.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Generally, doctrine of laches will be invoked only when there will be prejudice to a party's position. Ansley Park Plumbing & Heating Co. v. Mikart, Inc., 9 Bankr. 144 (Bankr. N.D. Ga. 1981).

Quiet title action. — Trial court did not err in refusing to deny property owners' petition to quiet title due to laches because the owners acquired their property on April 21, 2000, and over the next several years, the owners made repeated requests to adjoining landowners to stop using the street for anything other than access from the owners' driveways to the highway, but the adjoining landowners refused; the adjoining landowners identified no change in circumstance during the intervening years that would qualify as prejudice. Goodson v. Ford, 290 Ga. 662, 725 S.E.2d 229 (2012).

Cited in Sakas v. Jessee, 202 Ga. App. 838, 415 S.E.2d 670 (1992); Troup v. Loden, 266 Ga. 650, 469 S.E.2d 664 (1996); Hall v. Trubey, 269 Ga. 197, 498 S.E.2d 258 (1998); City of Duluth v. Riverbrooke Properties, Inc., 233 Ga. App. 46, 502 S.E.2d 806 (1998); Parker v. Shreve, 244 Ga. App. 350, 535 S.E.2d 332 (2000).

Equitable Demands Must Be Asserted Within Reasonable Time

Equity will not aid in the enforcement, etc.

Defendant's suit is properly barred by laches when defendant's claim of a resulting trust in a house is based on payments made 35 years ago to a person who is the sole record owner and is now dead. Stone v. Williams, 265 Ga. 480, 458 S.E.2d 343 (1995).

Laches is not, like limitations, a mere matter of time.

Mere lapse of time is usually insufficient to activate the doctrine of laches. Ansley Park Plumbing & Heating Co. v. Mikart, Inc., 9 Bankr. 144 (Bankr. N.D. Ga. 1981).

Constructive trust denied due to laches. — Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision for the pension in their divorce decree for 12 years and failed to bring suit until 5 years after payments allegedly became due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Laches Based on Inequity

Measure of delay. — Period of the delay in bringing suit to decide if it is barred by laches is measured from the time the cause of action was possessed by the party charged with laches or his privies. Chapman v. McClelland, 248 Ga. 725, 286 S.E.2d 290 (1982).

Pleading and Practice

Application to mandamus. — Supreme Court of Georgia concluded that case law supporting that a mandamus action can be barred by gross laches is the correct rule; thus, Crow v. McCallum, 215 Ga. 692, 696 (113 SE 203) (1960), and its progeny, were wrongly decided and overruled. Marsh v. Clarke County Sch. Dist., 292 Ga. 28, 732 S.E.2d 443 (2012).

Affirmative defense relevant. — Trial court's denial of a decedent's father's motion for partial summary judgment pursuant to O.C.G.A. § 9-11-56 in an action against the decedent's mother and the estate administrator was proper, because the defense of laches under O.C.G.A. § 23-1-25 was appropriate in defense of the father's request for imposition of a constructive trust on an annuity that was purchased with the wrongful death settlement proceeds, and the defense of advice of counsel under O.C.G.A. § 15-19-17 against the father's claim of breach of fiduciary duty was relevant to the mother's state of mind. Rhone v. Bolden, 270 Ga. App. 712, 608 S.E.2d 22 (2004).

CHAPTER 2

GROUNDS FOR EQUITABLE RELIEF

ARTICLE 1

GENERAL PROVISIONS

RESEARCH REFERENCES

ALR. — Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 ALR5th 747.

23-2-1. When equity will set aside judgment.

Reserved. Repealed by Ga. L. 1986, p. 294, § 3, effective March 26, 1986.

Editor's notes. — This Code section was based on Orig. Code 1863, § 3062; Code 1868, § 3074; Code 1873, § 3129; Code 1882, § 3129; Civil Code 1895, § 3988; Civil Code 1910, § 4585; Code 1933, § 37-220.

23-2-2. Setting aside sale or contract for inadequate consideration.

JUDICIAL DECISIONS

Analysis

General Consideration

Cited in Guillebeau v. Yeargin, 254 Ga. 490, 330 S.E.2d 585 (1985); Kimbrell v. Connor, 218 Ga. App. 812, 463 S.E.2d 376 (1995).

Applicability of Section

Under the principle enunciated in this section, etc.

The citation to Harrell v. Wilson appearing under this catchline in the bound

volume is incorrect. It should read, "233 Ga. 899, 213 S.E.2d 871 (1975)."

Failure to show disparity of mental ability in foreclosure sale contract. — Superior court did not err in granting a purchaser summary judgment in the purchaser's action seeking specific performance pursuant to O.C.G.A. § 23-2-131 requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid the company set forth was a mistake; although the company complained that the high bid was inadequate, the company failed to establish how that complaint allowed for the company to avoid the foreclosure sale contract, and the company did not cite any evidence authorizing a finding of any such disparity between the company and the purchaser. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

Inadequate Consideration and Mental Disparity Generally

1. In General

Conflict as to issue of disparate mental ability. — Where, in a wrongful death action, a railroad argued there was no evidence presented to show a disparate mental ability between anyone representing the railroad on the one hand and the plaintiffs on the other at the time of their signing of a contract of release, but plaintiffs showed that they were in a highly emotional state following the death of their son and that treatment for their stress included valium, and a psychologist, who tested the plaintiffs found their I.Q. levels to be in the "mentally defective" range, while the railroad agent involved, on the other hand, was college educated and had some 20 years' experience in claims investigation and settlement, under the "any evidence" standard, the railroad was not entitled to a directed verdict. Southern Ry. v. Lawson, 256 Ga. 798, 353 S.E.2d 491 (1987).

4. Weakness of Mind

Weakness of mind, etc.

In accord with bound volume. See Thomas v. Garrett, 265 Ga. 395, 456 S.E.2d 573 (1995).

5. Grief

Will executed within days of spouse's death. — Trial court did not err in charging the jury under O.C.G.A. § 23-2-2 in a suit by an 83-year old plaintiff to recover property from defendants, her brother-in-law and his wife, because the evidence showed that defendants took plaintiff to her bank and to a lawyer 10 days after her husband died, where she deeded her entire estate to them. Mullis v. Mullis, 245 Ga. App. 845, 539 S.E.2d 189 (2000).

Pleading and Practice

Charge to jury.

In an action to set aside a deed, an instruction that the jury might set aside a deed if it found the mental ability of one party merely less than the mental ability of the person with whom he or she was being compared was erroneous and, further, the giving of the charge was error because there was no evidence to warrant it. Godwin v. Godwin, 265 Ga. 891, 463 S.E.2d 685 (1995).

23-2-3. Payment of lost bonds or notes.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

ARTICLE 2
ACCIDENT AND MISTAKE

23-2-20. Which accidents relievable in equity.

JUDICIAL DECISIONS

Voluntary dismissal of claims with prejudice was not a contract and, thus, this section and § 23-2-21 did not apply to authorize setting aside the dismissal. Kent v. State Farm Mut. Auto. Ins. Co., 233 Ga. App. 564, 504 S.E.2d 710 (1998).

Cited in Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006).

23-2-21. What mistakes relievable in equity; power to relieve to be exercised cautiously.

Law reviews. — For note, the voluntary-payment doctrine in Georgia, see 16 Ga. L. Rev. 893 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration

A mistake, either of law or fact, etc. The power in equity to relieve mistakes should be exercised with caution, and the evidence shall be clear, unequivocal and decisive as to the mistake. Thomaston v. Fort Wayne Pools, Inc., 181 Ga. App. 541, 352 S.E.2d 794 (1987).

Reformation of lease agreement denied. — In an action seeking reformation of a lease agreement to include an option to purchase, the trial court properly granted the defendant's motion for directed verdict at the close of the plaintiff's evidence, where there was no evidence of mutual mistake, there was likewise no evidence of fraud or inequitable conduct in the record, it was undisputed that plaintiff did not read the lease agreement until months after he signed it, and the record did not demonstrate that a confidential relationship existed between the parties, but rather showed that they were friends engaged in an arms' length transaction. A.J. Concrete Pumping, Inc. v. Richard O'Brien Equip. Sales, Inc., 256 Ga. 795, 353 S.E.2d 496 (1987).

Cited in Roberts v. Gunter, 251 Ga. 276, 304 S.E.2d 369 (1983); Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985); Fulghum v. Kelly, 255 Ga. 652, 340 S.E.2d 589 (1986); Mag Mut. Ins. Co. v. Gatewood, 186 Ga. App. 169, 367 S.E.2d 63 (1988); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

Mutual Mistake

Equity will not reform a contract on the ground of mistake, etc. Because the plaintiff had opportunity to examine a second written tolling agreement before he executed it, and because there was no suggestion that the alleged mistake in the agreement was anything other than a unilateral mistake on the part of the plaintiff, the plaintiff's own

negligence resulted in there being no basis for reforming the parties' second written tolling agreement. Frame v. Hunter, Maclean, Exley & Dunn, P.C., 236 Ga. App. 226, 511 S.E.2d 585 (1999).

Wrong property foreclosed upon. — Because a mutual mistake of law was not a valid reason to nullify the parties' choice of Delaware law in order to uphold a right of first refusal, the parties' settlement agreement was not subject to reformation due to an alleged mutual mistake. Thus, under Delaware law, the right was properly declared invalid under the rule against perpetuities. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group, Inc., 283 Ga. 426, 659 S.E.2d 359 (2008).

Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Reformation of a bond was warranted based on mutual mistake. — Reformation of a bond was warranted based on mutual mistake since it was clear that a bank of which a bankruptcy debtor was the parent company was intended to be a named insured under the bond which named only the debtor as an insured; the bank was a named insured on a prior bond which the current bond was intended to replace, the bank was a named insured on the bond application, and the bank paid the bond premium. Lubin v. Cincinnati Ins. Co., No. 1:09-CV-2985-RWS, 2010 U.S. Dist. LEXIS 133794 (N.D. Ga. Dec. 17, 2010), aff'd, 677 F.3d 1039 (11th Cir. 2012).

Summary judgment improper if questions of fact remained regarding whether quitclaim deed was contrary to parties' agreement. — Trial court erred in granting a son's motion for summary judgment as to a parent's counterclaim seeking to eject the son from a home and to have a quitclaim deed rescinded or reformed because material questions of fact remained regarding whether the terms of the quitclaim deed were, by mutual mistake, contrary to the agreement of the parties; the parent's deposition testimony could reasonably be construed to signify that the parent expressed the parent's willingness to convey the property only if the parent retained a life estate and that the son accepted the conveyance subject to that condition. Hall v. Hall, 303 Ga. App. 434, 693 S.E.2d 624 (2010).

Reasonable Diligence

Equity will grant no relief, etc.

In accord with bound volume. See Barham v. United States, 715 F. Supp. 1091 (M.D. Ga. 1989).

Pleading and Practice

And evidence of mistake, etc.

In a diversity based suit in equity to set aside or deny res judicata effect to a prior state court judgment on the grounds of fraud and mutual mistake, the plaintiffs had to prove their claims by something more than a mere preponderance of the evidence. The evidence had to preponderate in the plaintiffs' favor, but it also had to be of "clear, unequivocal, and decisive" quality. Ahrens v. Katz, 595 F. Supp. 1108 (N.D. Ga. 1984).

In an action seeking cancellation of a warranty deed to a trustee, the beneficiary's testimony that he could not remember the execution of the deed did not demand a finding that the deed should be cancelled on the ground of legal mistake. Ivey v. Ivey, 266 Ga. 143, 465 S.E.2d 434 (1996).

Parol evidence.

Parol evidence can be offered to prove mistake. Vann v. Williams, 165 Ga. App.

Pleading and Practice (Cont'd)

457, 299 S.E.2d 908 (1983).

23-2-22. Mistake of law in instrument — By contracting parties.

Law reviews. — For annual survey of recent developments, see 38 Mercer L. Rev. 473 (1986).

JUDICIAL DECISIONS

Equity will relieve against mutual mistake, but only at the instance of a complainant who moves with reasonable diligence.

O.C.G.A. § 23-2-22 was inapplicable to a company's counterclaim to recover payments under a purchase agreement as O.C.G.A. § 23-2-22 offered relief following a mistake of law; the company made the payments in ignorance of the law and O.C.G.A. § 13-1-13 prohibited recovery of the payments voluntarily made in ignorance of the law. Wallis v. B & A Construction Co., 273 Ga. App. 68, 614 S.E.2d 193 (2005).

Contract not reformed based on mutual mistake of law. — Because a mutual mistake of law was not a valid reason to nullify the parties' choice of Delaware law in order to uphold a right of first refusal, the parties' settlement agreement was not subject to reformation due to an alleged mutual mistake. Thus, under Delaware law, the right was properly declared invalid under the rule against perpetuities. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group, Inc., 283 Ga. 426, 659 S.E.2d 359 (2008).

Parol evidence can be offered to prove mistake. Vann v. Williams, 165 Ga. App. 457, 299 S.E.2d 908 (1983).

Admissibility of parol evidence. — See Posey v. Medical Center-West, Inc., 257 Ga. 55, 354 S.E.2d 417 (1987) (release of tort feasor from liability).

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. Florida Int'l Indem. Co. v. City of Metter, 952 F.2d 1297 (11th Cir. 1992), aff'd, 984 F.2d 1138 (11th Cir. 1993).

In tort action, reformation warranted if mutual mistake. — Where an insured signed a general release believing that it would not affect her claim against her underinsured motorist carrier, reformation of the release would be warranted if mutual mistake of law could be proved. Superior Ins. Co. v. Dawkins, 229 Ga. App. 45, 494 S.E.2d 208 (1997).

Reformation claim barred by res judicata. — Despite a payee's argument that a reformation claim could not have previously been filed because neither party foresaw that a contract claim could have been disposed of as it was, that argument was rejected as spurious, and because this argument ignored the fact that the payee filed a prior quantum meruit claim, which was predicated on the lack of an enforceable contract; hence, the payor obviously anticipated that the contract might not be entirely enforceable, and having done so, could have recognized the need to bring a reformation claim in the earlier action. ChoicePoint Servs. v. Hiers, 284 Ga. App. 640, 644 S.E.2d 456 (2007), cert. denied, 2007 Ga. LEXIS 499 (Ga. 2007).

Cited in Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985); Fulghum v. Kelly, 255 Ga. 652, 340 S.E.2d 589 (1986).

23-2-23. Mistake of law in instrument — By agent.

JUDICIAL DECISIONS

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. Florida Int'l Indem. Co. v. City of Metter, 952 F.2d 1297 (11th Cir. 1992), aff'd, 984 F.2d 1138 (11th Cir. 1993).

23-2-24. When mistake of fact relieved.

JUDICIAL DECISIONS

Standing to seek reformation of liability contract. — In certifying certain questions to the Georgia Supreme Court, the federal Court of Appeals concluded that it is an open question of Georgia law whether a person injured by a municipality has a beneficial interest in the municipality's liability contract sufficient to provide standing to seek reformation. Florida Int'l Indem. Co. v. City of Metter, 952 F.2d 1297 (11th Cir. 1992), aff'd, 984 F.2d 1138 (11th Cir. 1993).

Affirmation of contract barred rescission. — The plaintiffs were not entitled to rescission of their purchase of a house on the basis of a mistake of fact arising from a water line easement since their conduct in rebuilding the house with improvements following a tornado showed that they intended to treat the home as their own and was indicative of their affirmation of the contract. Aliabadi v. McCar Dev. Corp., 249 Ga. App. 309, 547 S.E.2d 607 (2001).

Cited in Crane v. Adams-Cates Co., 256 Ga. 407, 350 S.E.2d 767 (1986); Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

23-2-25. Form of conveyance contrary to intent.

JUDICIAL DECISIONS

Reformation as applied to a contract is a remedy, etc.

An IRS objection to the proposed reformation of certain deeds to reflect that all parties to the transfer of a Georgia nursing home had intended an omitted tract to be included within the description was rejected despite the IRS's insistence that a lien filed pursuant to 26 U.S.C. § 6321 was effective to encumber the omitted tract because all criteria for reformation pursuant to O.C.G.A. § 23-2-25 were met. Nat'l Assistance Bureau, Inc. v. Macon Mem'l Intermediate Care Home, Inc., No. 5:06-cv-301 (CAR), 2009 U.S. Dist. LEXIS 66362 (M.D. Ga. June 8, 2009).

Wrong property foreclosed upon. — Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Judgment creditor had no right to intervene in action for reformation of a deed. — Trial court abused the court's discretion in allowing a borrower's judgment creditor to intervene as a matter of right pursuant to O.C.G.A. § 9-11-24 in the borrower's action against the lender for reformation of a deed pursuant to O.C.G.A. § 23-2-25. The creditor had no

interest directly relating to the subject matter of the suit and had other remedies. Potter's Props., LLC v. VNS Corp., 306 Ga. App. 621, 703 S.E.2d 79 (2010).

Reformation not warranted. — Creditor could not prevail on the creditor's claim for equitable reformation of a security deed executed by a debtor that did not own the property because nothing in the chain of title provided constructive notice to a potential purchaser of the property of the creditor's equitable interest in the property. Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Reformation warranted. — Creditor prevailed on the creditor's claim for equitable reformation of a security deed executed by a debtor that did not own the property because a later modification of the deed was filed and was within the chain of title for the property, providing any potential purchaser of the property constructive notice of the creditor's equitable interest in the property. Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Reformation was appropriate under Georgia law as it was clear that both a Chapter 13 debtor and a bank intended the legal description in a security deed to include tract two only, and that a mutual mistake occurred due to a scrivener's error. There was no prejudice to the debtor as the trustee required the debtor to propose a Chapter 13 plan as though the deed had been reformed; further, prejudice due to the loss of debtor's house was not grounds to deny reformation as the debtor contracted and intended to pledge tract two as collateral, the debtor had the use of the loan proceeds, and the debtor used funds to satisfy an earlier debt on the tract. Deutsche Bank Nat'l Trust Co. v. Thompson (In re Thompson), 499 B.R. 908 (Bankr. S.D. Ga. 2013).

Trial court did not err in granting summary judgment to the bank as to the bank's claim for reformation to include a mistakenly omitted signature on the security deed as the borrowers had not suffered prejudice where the borrowers received a loan and used part of that loan to satisfy an earlier loan from another lender relating to the property, and the borrowers failed to show that the borrowers would suffer any prejudice if the deed were reformed. Vibert v. Bank of America, N.A., 327 Ga. App. 782, 761 S.E.2d 162 (2014).

Bankruptcy court did not commit clear error in reforming a security deed and cancelling a quitclaim deed due to the parties' mutual mistake because the undisputed facts showed that the Chapter 13 debtor and the lender intended for the security deed's legal description to include one tract and not three tracts. Thompson v. Deutsche Bank Nat'l Trust Co. (In re Thompson), No. 113-181, 2014 U.S. Dist. LEXIS 110609 (S.D. Ga. Aug. 11, 2014).

Cited in Curry v. Curry, 267 Ga. 66, 473 S.E.2d 760 (1996); Vance v. Jackson, 233 Ga. App. 480, 504 S.E.2d 529 (1998).

23-2-27. When equitable interference not authorized — Mere ignorance of law.

JUDICIAL DECISIONS

This section has no application to a mutual mistake of law by both parties. Superior Ins. Co. v. Dawkins, 229 Ga. App. 45, 494 S.E.2d 208 (1997).

Because a mutual mistake of law was not a valid reason to nullify the parties' choice of Delaware law in order to uphold a right of first refusal, the parties' settlement agreement was not subject to reformation due to an alleged mutual mistake. Thus, under Delaware law, the right was properly declared invalid under the rule against perpetuities. CS-Lakeview at Gwinnett, Inc. v. Simon Prop. Group, Inc., 283 Ga. 426, 659 S.E.2d 359 (2008).

Mistake in opinion or mental conclusion not ground for relief. — Mistake of a past or present fact may warrant equitable relief, but a mistake in opinion or mental conclusion as to an uncertain

future event is not ground for relief. Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985).

23-2-29. When equitable interference not authorized — Failure to exercise diligence; ignorance of fact absent fraud.

Law reviews. — For article, "Limitations on the Meaning and Impact of DeGarmo v. DeGarmo," see 4 Ga. St. B.J. 20 (1998).

JUDICIAL DECISIONS

Analysis

General Consideration

No basis for reformation. — Any possible violation of a fiduciary bond which remained between a city and a law firm as a result of a prior attorney-client relationship provided no basis for reforming an amended lease because there was no indication that the law firm was a party to its attorney's alleged duplicity and there was no proof in the record of any occurrence which prevented the city from reading the amended lease prior to executing the document. City of College Park v. Sheraton Savannah Corp., 235 Ga. App. 561, 509 S.E.2d 371 (1998).

An insurer was entitled to reformation of a policy where coverage of a vehicle was extended at the insured's request, after the vehicle was involved in an accident; even though the insurer could have inquired before extending the coverage, the insured was not prejudiced by the insurer's action and would obtain a windfall absent reformation of the contract. Cotton States Mut. Ins. Co. v. Woodruff, 215 Ga. App. 511, 451 S.E.2d 106 (1994).

Specific performance warranted in foreclosure sale. — Superior court did not err in granting a purchaser summary judgment in the purchaser's action seeking specific performance pursuant to O.C.G.A. § 23-2-131 and requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid the company set forth was a mistake. Because the dollar amount of the high bid at the foreclosure sale alone made it immediately apparent that there had been a mistake, a reasonable inference arose that had reasonable diligence been employed before the foreclosure sale, the alleged unilateral mistake would not have occurred. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

Equitable interference not authorized in quiet title action. — Trial court did not err in granting a bank and purchasers summary judgment in a son's action to quiet title to a parcel of land because the son did not act with reasonable diligence to verify that a house was located on the land that the son received under a deed, and the purchasers would be prejudiced if the son were granted relief. Haffner v. Davis, 290 Ga. 753, 725 S.E.2d 286 (2012).

Constructive trust denied due to laches. — Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision for the pension in their divorce decree for 12 years and failed to bring suit until 5 years after payments allegedly became

General Consideration (Cont'd)

due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Cited in FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981); Gulf Life Ins. Co. v. Folsom, 256 Ga. 400, 349 S.E.2d 368 (1986); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006); Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008).

Reasonable Diligence

1. In General

Reformation of a deed. — Trial court properly ordered reformation of a deed of assent to include an entire eight acre tract of land as opposed to only a partial strip because reformation was not barred by the seven-year statute of limitations since the seller was not prejudiced as the deed should have been corrected previously, thus, equitable relief under O.C.G.A. § 23-2-32(b) was appropriate. Ehlers v. Upper West Side, LLC, 292 Ga. 151, 733 S.E.2d 723 (2012).

2. Duty to Read Written Instruments

One executing a contract or deed has the duty to read it, etc.

Because there was no fraud that prevented siblings from reading a deed presented to them by their brother, which he allegedly represented as an easement, and no fiduciary relationship upon which they could have justifiably relied, the siblings should have discovered the alleged fraud when they signed the deed, and the seven-year statute of limitations expired seven years later. McCall v. Williams, 326 Ga. App. 99, 756 S.E.2d 217 (2014).

23-2-30. Reformation and execution of contract in case of mistake distinguished.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Cited in Hurst v. McDaniel, 159 Ga. App. 702, 285 S.E.2d 40 (1981); Fulghum v. Kelly, 255 Ga. 652, 340 S.E.2d 589 (1986); Brannen v. Gulf Life Ins. Co., 201 Ga. App. 241, 410 S.E.2d 763 (1991); Curry v. Curry, 267 Ga. 66, 473 S.E.2d 760 (1996).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 21A Am. Jur. Pleading and Practice Forms, Reformation of Instruments, § 2.

23-2-31. Rescission for unilateral mistake of fact.

Law reviews. — For article, "Limitations on the Meaning and Impact of DeGarmo v. DeGarmo," see 4 Ga. St. B.J. 20 (1998).

JUDICIAL DECISIONS

ANALYSIS

REFORMATION
RESCISSION
2. IGNORANCE OF FACT
4. CLERICAL ERROR

Reformation

Mutual mistake can lead to reformation. — Where the intent of the parties and their mutual mistake in having failed to notice the discrepancy between that intent and the written document was established by the evidence, the fact that the discrepancy resulted from the landlord's error as scrivener did not preclude reformation of the lease. Zaimis v. Sharis, 275 Ga. 532, 570 S.E.2d 313 (2002).

Rescission

2. Ignorance of Fact

Wrong property foreclosed upon. — Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Mistake. — In a breach of contract action regarding a loan contract between the lender and its debtor, the debtor's failure to cite to facts in the record establishing that the $4,500 note was paid in full led to the conclusion that it was not, and the fact that the debtor might have made payments in excess of $25,000 regarding all the outstanding loans with the lender did not in and of itself prove that the $4,500 loan had been paid off. Jenkins v. Sallie Mae, Inc., 286 Ga. App. 502, 649 S.E.2d 802 (2007).

4. Clerical Error

Error resulting in seven percent discrepancy in amount of bid. — Contractor was entitled to rescind its construction bid for a church building, where a clerical error had resulted in a seven percent discrepancy in the amount of the bid, notwithstanding bidding instructions which prohibited the contractor from withdrawing the bid on the ground of "negligence." First Baptist Church v. Barber Contracting Co., 189 Ga. App. 804, 377 S.E.2d 717 (1989).

23-2-32. When negligent complainant granted relief.

Law reviews. — For article, "Limitations on the Meaning and Impact of DeGarmo v. DeGarmo," see 4 Ga. St. B.J. 20 (1998).

JUDICIAL DECISIONS

Reformation of a deed. — Trial court properly ordered reformation of a deed of assent to include an entire eight acre tract of land as opposed to only a partial strip because reformation was not barred by the seven-year statute of limitations since the seller was not prejudiced as the deed should have been corrected previously, thus, equitable relief under O.C.G.A. § 23-2-32(b) was appropriate. Ehlers v. Upper West Side, LLC, 292 Ga. 151, 733 S.E.2d 723 (2012).

Rescission notwithstanding prohibition of bid withdrawal for negligence. — Contractor was entitled to rescind its construction bid for a church building, where a clerical error had resulted in a seven percent discrepancy in the amount of the bid, notwithstanding bidding instructions which prohibited the contractor from withdrawing the bid on the ground of "negligence." First Baptist Church v. Barber Contracting Co., 189 Ga. App. 804, 377 S.E.2d 717 (1989).

An insurer was entitled to reformation of a policy where coverage of a vehicle was extended at the insured's request, after the vehicle was involved in an accident; even though the insurer could have inquired before extending the coverage, the insured was not prejudiced by the insurer's action and would obtain a windfall absent reformation of the contract. Cotton States Mut. Ins. Co. v. Woodruff, 215 Ga. App. 511, 451 S.E.2d 106 (1994).

Recovery of payment mistakenly paid. — In an action for money had and received, the plaintiff generally can recover a payment mistakenly made when that mistake was caused by his lack of diligence or his negligence in ascertaining the true facts and the other party would not be prejudiced by refunding the payment, subject to a weighing of the equities between the parties by the trier of fact. Gulf Life Ins. Co. v. Folsom, 256 Ga. 400, 349 S.E.2d 368 (1986) (relying solely on computer records); Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988).

Summary judgment for a retirement system was reversed because there were fact issues as to voluntary payment under O.C.G.A. § 13-1-13, and as to equitable estoppel under O.C.G.A. § 23-2-32, after the son claimed that the mother told the son that the benefits would continue to be paid after the mother's death; details of how the retirement system discovered the mother's death were needed to resolve the possibility that the son retained and spent the money in good faith. Applebury v. Teachers' Ret. Sys., 275 Ga. App. 194, 620 S.E.2d 452 (2005).

The voluntary payment doctrine did not bar a city's unjust enrichment and conversion claims filed against a construction contractor, as the contractor failed to show that: (1) a genuine issue of material fact remained over whether the city was negligent in ascertaining the true facts; and (2) any prejudice would result if the mistaken duplicate payment the city made to the contractor were returned to the city. D & H Constr. Co. v. City of Woodstock, 284 Ga. App. 314, 643 S.E.2d 826 (2007).

Defendants not prejudiced, plaintiff's alleged negligence no defense to claim for money had and received. — Lawyer falsely told clients that the clients' lawsuit was settled, paid the clients money the lawyer obtained by kiting checks from the law firm's bank accounts, and defrauded a relative into lending the lawyer money to cover the shortage in the accounts. As the relative's failure to fully investigate the facts before making the loan did not prejudice the clients, any negligence on the relative's part was not a defense under O.C.G.A. § 23-2-32 to the relative's claim against the clients for money had and received. Haugabook v. Crisler, 297 Ga. App. 428, 677 S.E.2d 355 (2009).

Considerations by jury in claim for money had and received. — The equities to be considered by the jury in the case of a claim for money had and received are: (1) the degree of negligence on the plaintiff's part in erroneously paying over the money, (2) the level of good faith with which the defendant acted in receiving and retaining the money, and (3) prejudice, i.e., whether the defendant's position has so changed that it would be unfair to require him to pay the money back. Gulf Life Ins. Co. v. Folsom, 907 F.2d 1115 (11th Cir. 1990).

In an action for money had and received, where the plaintiff was negligent, the plaintiff is entitled to get his money back—unless the jury decides that he doesn't deserve it back or that the defendant deserves to keep it. Gulf Life Ins. Co. v. Folsom, 907 F.2d 1115 (11th Cir. 1990).

Effect of material change of position by payee of funds sought to be recovered. — The superior court did not err in ruling that a recipient of Medicaid reimbursement funds had so changed its position in reliance on its hospital-based classification during the period in question that it would be unjust to require it to refund the monies in question. Department of Medical Assistance v. Presbyterian Home, Inc., 200 Ga. App. 885, 409 S.E.2d 881 (1991), cert. denied, Georgia Dep't of Medical Assistance v. Presbyterian Home, Inc., 1992 Ga. LEXIS 357 (1992).

Payment of late charges. — The voluntary payment doctrine barred claims for recovery of late fees paid by cable television subscribers under a service agreement with the cable company which stated that a late fee would be charged to a customer's account if payment was not received by the due date. Telescripps Cable Co. v. Welsh, 247 Ga. App. 282, 542 S.E.2d 640 (2000).

Wrong property foreclosed upon. — Trial court properly reformed security deed and declared that suing lender had first priority over certain tract of land since there was no doubt that parties intended for the tract to have been subject

to the security deed alone; trial court also properly directed verdict in favor of suing lender as to its claim for rescission and cancellation of the deed it obtained when it mistakenly foreclosed on the wrong tract, as such relief was the proper remedy. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Company required to honor bid price on foreclosed property. — Superior court did not err in granting a purchaser summary judgment in its action seeking specific performance pursuant to O.C.G.A. § 23-2-131 requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid it set forth was a mistake. O.C.G.A. § 23-2-32(b) did not provide relief from the foreclosure sale contract because the company failed to show how the purchaser would not be prejudiced if the company were granted relief and the record was void of any evidence that there was no difference between the contract price and the fair market value of the real property. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

O.C.G.A. § 23-2-32(b) did not apply to a son's action to quiet title to a parcel of land because the original grantor, the son's father, no longer owned the land, and buyers of the land were bona fide purchasers who had no notice of the mistake in the deed until two years after the purchasers' purchased the property from the bank. Haffner v. Davis, 290 Ga. 753, 725 S.E.2d 286 (2012).

Denial of request for reformation of contract held proper. — Trial court properly entered judgment in favor of a purchaser in a bank's action seeking reformation of a security deed and cancellation of the levy and sale of two lots; while O.C.G.A. § 23-2-32(b) stated that relief could be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby, the purchaser had begun making repairs and improving the property, and had spent $12,410 and continued to incur expenses, and thus, the trial court's finding that the purchaser would be prejudiced by the reformation sought by the bank was not clearly erroneous. First Nat'l Bank v. Carr, 260 Ga. App. 439, 579 S.E.2d 863 (2003).

Constructive trust denied due to laches. — Former wife was not entitled to impose a constructive trust on her former husband's military pension pursuant to O.C.G.A. § 53-12-132 because she failed to object to the absence of any provision for the pension in their divorce decree for 12 years and failed to bring suit until five years after payments allegedly became due. Davis v. Davis, 310 Ga. App. 512, 713 S.E.2d 694 (2011).

Cited in FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981); Atkinson v. Atkinson, 254 Ga. 70, 326 S.E.2d 206 (1985); Crane v. Adams-Cates Co., 256 Ga. 407, 350 S.E.2d 767 (1986); Brannen v. Gulf Life Ins. Co., 201 Ga. App. 241, 410 S.E.2d 763 (1991); Baghdady v. Central Life Ins. Co., 224 Ga. App. 170, 480 S.E.2d 221 (1996); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006); Levenson v. Word, 294 Ga. App. 104, 668 S.E.2d 763 (2008).

23-2-33. Mere volunteers, in general; exception for executed contracts.

JUDICIAL DECISIONS

Voluntary rent provision and debt payment. — Defendant's claim that she satisfied her debt on a promissory note owed to her spouse by providing her mother-in-law with a rent-free apartment and by paying certain debts that spouse owed to certain creditors was to no avail as it was done under a mere volunteer

arrangement with no outstanding obligations to do so. United States v. Speir, 808 F. Supp. 829 (S.D. Ga. 1992).

23-2-34. Relief against original parties or privies; exception.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in DOT v. Brooks, 254 Ga. 303, 328 S.E.2d 705 (1985); Anderson v. Streck, 190 Ga. App. 224, 378 S.E.2d 526 (1989); Yeazel v. Burger King Corp., 241 Ga. App. 90, 526 S.E.2d 112 (1999).

Application of Section

1. Privies

But section extends no rights to one not privy under original contract.

In a quiet title action, the trial court properly granted summary judgment to the adjoining landowners as the suing neighbor was not entitled to reformation of corrective deeds entered into between the suing neighbor's predecessor in title and the adjoining landowners since the suing neighbor was not a party to the corrective deeds. Moore v. McBryar, 290 Ga. App. 725, 659 S.E.2d 789 (2008).

Privy applied to Internal Revenue Service. — Internal Revenue Service, by reason of the fact that it was asserting a tax lien against property that inadvertently had been omitted from a conveyance deed, was a privy in law that was bound under Georgia law by a reformed conveyance because O.C.G.A. § 23-2-34 provided that equity will grant relief as between the original parties or their privies in law, in fact, or in estate, except bona fide purchasers for value without notice. Nat'l Assistance Bureau, Inc. v. Macon Mem'l Intermediate Care Home, Inc., No. 5:06-cv-301 (CAR), 2009 U.S. Dist. LEXIS 66362 (M.D. Ga. June 8, 2009).

Children who were remaindermen, and would receive whatever assets of a marital trust that their mother did not appoint or distribute by will, were privies in estate with their mother. Richardson v. Bridges, 260 Ga. 62, 389 S.E.2d 215 (1990).

Bona Fide Purchasers

Section protects interests of bona fide purchasers.

Creditor could not prevail on the creditor's claim for equitable reformation of a security deed executed by a debtor that did not own the property because nothing in the chain of title provided constructive notice to a potential purchaser of the property of the creditor's equitable interest in the property. Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

Constructive and inquiry notice. — Purchasers of land are charged with constructive notice of recorded instruments and also recognizes the concept of inquiry notice. For a discussion of the balance between these concepts, see Stearns Bank, N.A. v. Rent-A-Tent, Inc. (In re Rent A Tent, Inc.), 468 B.R. 442 (Bankr. N.D. Ga. 2012).

ARTICLE 3

FRAUD

Cross references. — Fraudulent entries in elections, § 21-2-562 et seq. Equitable estoppel, § 24-14-29.

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Fraudulent Misrepresentation as to Use to Which Real Property Could Be Put, 38 POF2d 91. Fraudulent Representations Inducing the Purchase of a Small Business, 30 POF3d 1.

23-2-51. Fraud as actual or constructive.

Law reviews. — For case note, "Lynch v. Waters: Tolling Georgia's Statute of Limitations for Medical Malpractice," see 38 Mercer L. Rev. 1493 (1987).

JUDICIAL DECISIONS

Analysis

General Consideration

Actionable fraud cannot be based, etc.

The general rule is that fraud cannot be predicated upon statements which are promissory in their nature as to future acts. FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981).

A promise, even a false promise, to perform an act in the future is not a false pretense or false representation, and does not constitute the basis for an action for fraud. FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981).

Cited in Kessler v. Liberty Mut. Ins. Co., 157 Ga. App. 287, 277 S.E.2d 257 (1981); Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981); Goodlett v. Ray Label Corp., 171 Ga. App. 377, 319 S.E.2d 533 (1984); Palmer v. Neal, 602 F. Supp. 882 (N.D. Ga. 1984); Stanford v. Otto Niederer & Sons, 178 Ga. App. 56, 341 S.E.2d 892 (1986); Tarbutton v. All That Tract or Parcel of Land Known as Carter Place, 641 F. Supp. 521 (M.D. Ga. 1986); Duracell, Inc. v. SW Consultants, Inc., 126 F.R.D. 571 (N.D. Ga. 1989); Holmes v. Drucker, 201 Ga. App. 687, 411 S.E.2d 728 (1991); O'Berry v. Cooper, 202 Ga. App. 97, 413 S.E.2d 736 (1991); McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992); Sears Mtg. Corp. v. Leeds Bldg. Prods., Inc., 219 Ga. App. 349, 464 S.E.2d 907 (1995); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456 (M.D. Ga. 1995); Kodadek v. Lieberman, 247 Ga. App. 606, 545 S.E.2d 25 (2001); Wessinger v. Spivey (In re Galbreath), 475 B.R. 749 (Bankr. S.D. Ga. 2003).

Fraud Generally

2. Misrepresentation Generally

Innocent misstatement may amount to negligence but is not fraud. Day v. Randolph, 159 Ga. App. 474, 283 S.E.2d 687 (1981).

In the absence of a confidential relationship, etc.

In the absence of special circumstances

Fraud Generally (Cont'd)
2. Misrepresentation
Generally (Cont'd)

one must exercise ordinary diligence in making an independent verification of contractual terms and representations, failure to do which will bar an action based on fraud. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981).

One cannot claim to be defrauded about a matter equally open to the observation of all parties where no special relation of trust or confidence exists. Hubert v. Beale Roofing, Inc., 158 Ga. App. 145, 279 S.E.2d 336 (1981).

3. Actual Fraud

Essential elements.

The five elements of fraud and deceit in Georgia are: (1) false representation made by the defendant; (2) scienter; (3) an intention to induce the plaintiff to act or refrain from acting in reliance by the plaintiff; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff. Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981).

The five elements necessary to be shown in an action for fraud are that the misrepresentation or falsehood was knowingly made, that it related to a material fact, that its purpose was to deceive another and induce him to act, that he did act upon it and that he was injured as a result. Day v. Randolph, 159 Ga. App. 474, 283 S.E.2d 687 (1981).

An independent action in tort for deceit must be grounded on actual fraud. Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982).

A theft offense constitutes actual moral fraud, and the trial court did not err in failing to charge the differences between the two types of fraud where defendant admitted theft. Alford v. Oliver, 169 Ga. App. 865, 315 S.E.2d 299 (1984).

Invoice practices constituted evidence from which a jury might have concluded that a contractor engaged in covert dealings with employee, and the employee's alleged destruction of business records might have been considered evidence of fraud under O.C.G.A. § 23-2-51. GIW Indus. v. JerPeg Contr., Inc., 530 F. Supp. 2d 1323 (S.D. Ga. 2008).

4. Constructive Fraud

Constructive fraud does not involve moral guilt, etc.

Constructive fraud may arise out of any act of omission or commission, contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another; constructive fraud may moreover be consistent with innocence and not smacking with moral guilt. Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988).

"Contrary to good conscience" requirement. — Where there is no evidence of suppression, misrepresentation or concealment or bad faith so as to impute moral guilt, the mere omission of a matter from a document coupled with the failure to reveal the omission can hardly be even constructive fraud unless it is "contrary to good conscience." Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (1988).

Knowledge not required. — Constructive fraud is legal fraud, but does not require knowledge or scienter. Macon-Bibb County Hosp. Auth. v. Georgia Kaolin Co., 646 F. Supp. 90 (M.D. Ga. 1986), aff'd, 817 F.2d 98 (11th Cir. 1987).

Evidence of constructive fraud. — Where claimant was seeking workers' compensation benefits from the employer based on her alleged total disability and inability to work but at the same time she took this position before the Workers' Compensation Board, she was gainfully employed by a different employer, this is evidence sufficient to support the superior court's finding of constructive fraud. Dennington v. Rockdale Package Stores, Inc., 161 Ga. App. 450, 288 S.E.2d 709 (1982).

Nondisclosure. — Nondisclosure may provide the basis for constructive fraud where a party is under an obligation to communicate. First Union Nat'l Bank v. Davies-Elliot, Inc., 207 Ga. App. 791, 429 S.E.2d 161 (1993).

Even though a bank had a duty to notify its customer of a change in its signature

verification procedures, where there was no evidence that the bank refrained from informing its customers in order to induce them to take or refrain from taking any certain action, there was no showing of constructive fraud. Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

False identities. — Trial court properly granted summary judgment to the auto dealer, mortgage broker, and the lender on the accused person's contention that they committed constructive fraud by approving and acting upon the credit application filled out by another person who used the accused person's name to obtain the financing necessary to purchase a truck. Constructive fraud is an equitable doctrine that would not support the accused person's request for damages under these circumstances, especially since the evidence did not show they knew or should have known of the impropriety surrounding the transaction. Blakey v. Victory Equip. Sales, inc., 259 Ga. App. 34, 576 S.E.2d 38 (2002).

Confidential relationships. — Executor's claim that a brother and a wife committed constructive fraud by withdrawing money from a decedent's bank account while the decedent was living with them prior to the decedent's death was dismissed on summary judgment; even if a confidential relationship existed between the decedent and the brother and the wife, the executor could not seek money damages on a claim brought under O.C.G.A. § 23-2-51(b). Rowland v. Rowland, 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Constructive fraud not found. — Superior court did not err in failing to vacate an order allowing an employee to change an authorized treating physician, as the employer failed to show that due to the employee's misleading service and the Board's loss of its pleadings, it was the victim of constructive fraud which amounted to the deprivation of due process; while the employer should have been served with the evidence presented to the administrative law judge, and the Board should have properly handled the employee's filings, the employer could not show that it suffered any harm or injury. MARTA v. Reid, 282 Ga. App. 877, 640 S.E.2d 300 (2006).

No fraud shown on part of developer. — In an action brought by the purchasers of a lot seeking to cancel the developer's security deed based upon alleged fraud, the trial court properly granted summary judgment to the developer as, even if the developer knew of the sale of the lot to the purchasers, such sale did not estop the developer from the developer's claim against the lot pursuant to the developer's security deed; however, the trial court did err by denying the equitable subrogation claim asserted by the purchasers' lender since exercising subrogation did not prejudice the developer in any manner. Byers v. McGuire Props., 285 Ga. 530, 679 S.E.2d 1 (2009).

Pleading and Practice

In order to give rise to an action for damages, the defendant's fraud must be actual, i.e., the misrepresentation must be made either knowingly or with reckless disregard for the consequences. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

"Innocent" or "constructive" fraud exists only as an equitable doctrine and will not support an action in tort for damages. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

Fraud may be proved by showing a present intent to dishonor the promise to undertake a future act or present knowledge of the impossibility of an opinion. FDIC v. Lattimore Land Corp., 656 F.2d 139 (5th Cir. 1981).

Instructions. — It was error for court to charge jury on actual and constructive fraud in language of this section and § 23-2-57, but to neglect to charge on essential elements of actual fraud. Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982).

23-2-52. Misrepresentation as legal fraud.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Statements as to the nature of insurance coverage are opinions of law and cannot be the basis of a cause of action for fraud. Macon-Bibb County Hosp. Auth. v. Georgia Kaolin Co., 646 F. Supp. 90 (M.D. Ga. 1986), aff'd, 817 F.2d 98 (11th Cir. 1987).

Knowledge of seller that product unavailable. — Salesman fraudulently induced customers to execute a sales contract by representing that "blue sculpted" carpet was available when he knew it was not or recklessly asserted the fact with intent to deceive. Country Pride Homes, Inc. v. DuBois, 201 Ga. App. 740, 412 S.E.2d 282 (1991).

Civil fraud and theft by deception have different elements and showing that there are jury issues as to fraud does not necessarily show that there are jury issues as to theft by deception; a failure to show the level of intent needed for proving theft by deception would preclude a jury issue on that crime as a predicate act for RICO purposes, defeating a RICO claim. Avery v. Chrysler Motors Corp., 214 Ga. App. 602, 448 S.E.2d 737 (1994).

Cited in McClure v. Thomas Cook, Inc., 158 Ga. App. 467, 280 S.E.2d 876 (1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E.2d 533 (1982); Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (1988); O'Brien v. Union Oil Co., 699 F. Supp. 1562 (N.D. Ga. 1988); Johnson Realty, Inc. v. Hand, 189 Ga. App. 706, 377 S.E.2d 176 (1988); Vickers v. Roadway Express, Inc., 210 Ga. App. 78, 435 S.E.2d 253 (1993); In re Dukes, 213 Bankr. 202 (Bankr. S.D. Ga. 1997); Sellers Bros., Inc. v. Imperial Flowers, Inc., 232 Ga. App. 687, 503 S.E.2d 573 (1998); GE Life & Annuity Assur. Co. v. Donaldson, 189 F. Supp. 2d 1348 (M.D. Ga. 2002); GE Life & Annuity Assur. Co. v. Barbour, 189 F. Supp. 2d 1360 (M.D. Ga. 2002); McBride v. Life Ins. Co., 190 F. Supp. 2d 1366 (M.D. Ga. 2002); GE Life & Annuity Assur. Co. v. Barbour, 191 F. Supp. 2d 1375 (M.D. Ga. 2002); GE Life & Annuity Assur. Co. v. Combs, 191 F. Supp. 2d 1364 (M.D. Ga. 2002); J'Carpc, LLC v. Wilkins, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

Ordinary Diligence

Failure to open trunk of car represented as new. — It cannot be said as a matter of law that failure of plaintiff to open trunk of car represented as new in order to inspect for damage, either at time of purchase or within three and a half months thereafter amounted to failure of due diligence. Horne v. Claude Ray Ford Sales, Inc., 162 Ga. App. 329, 290 S.E.2d 497 (1982).

Pleading and Practice

In order to give rise to an action for damages, the defendant's fraud must be actual, i.e., the misrepresentation must be made either knowingly or with reckless disregard for the consequences. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

"Innocent" or "constructive" fraud exists only as an equitable doctrine and will not support an action in tort for damages. Irvin v. Lowe's of Gainesville, Inc., 165 Ga. App. 828, 302 S.E.2d 734 (1983).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Conveyance with Intent to Defraud Creditors, 5 POF2d 697.

False Representation as to Quality or Character of Product, 35 POF2d 255.

ALR. — Misrepresentation in proxy solicitation — state cases, 20 ALR4th 1287.

Vendor's action against vendee's prospective lender for misrepresentation respecting or failure to complete loan commitment, 30 ALR4th 474.

Misrepresentation regarding sterility or use of birth control, 31 ALR4th 389.

Liability of termite or other pest control or inspection contractor for work or representations, 32 ALR4th 682.

Remedies for fraud or misrepresentation as to heating or cooling costs of realty purchased, 32 ALR4th 828.

Real-estate broker's or agent's misrepresentation to, or failure to inform, vendor regarding value of vendor's real property, 33 ALR4th 944.

Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 ALR5th 301.

23-2-53. Suppression of fact as fraud.

Law reviews. — For article, "Common Fact Patterns of Stock Broker Fraud and Misconduct," see 7 Ga. St. B.J. 14 (2002).

JUDICIAL DECISIONS

Constructive fraud "contrary to good conscience" requirement. — Where there is no evidence of suppression, misrepresentation or concealment or bad faith so as to impute moral guilt, the mere omission of a matter from a document coupled with the failure to reveal the omission can hardly be even constructive fraud unless it is "contrary to good conscience." Rhodes v. Perimeter Properties, Inc., 187 Ga. App. 55, 369 S.E.2d 332 (1988).

No obligation to disclose information equally available to both parties in arms-length business or contractual relationship. — While concealment of material facts may amount to fraud when the concealment is of intrinsic qualities the other party could not discover by the exercise of ordinary care, in an arms-length business or contractual relationship there is no obligation to disclose information which is equally available to both parties. Under such circumstances, actionable fraud cannot be shown unless the plaintiff exercised due care to discover the fraud. Southern Intermodal Logistics, Inc. v. Smith & Kelly Co., 190 Ga. App. 584, 379 S.E.2d 612 (1989).

There existed no confidential relationship between business and contractor who contracted on virtually equal terms and at arms-length, and where business elected to employ a separate contractor thereby electing not to rely solely on the first contractor. American Honda Motor Co. v. Williams & Assocs., 208 Ga. App. 636, 431 S.E.2d 437 (1993).

Attorney for opposing party had no duty to advise of legal rights. — In taxpayers' claim against a purchaser's assignee for rescission of a redemption agreement, the facts did not support rescission. The assignee's attorney did not defraud them or conceal any facts, but advised them to hire an attorney, and any failure to advise them of their legal rights was an opinion as to a matter of law and not a material fact. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

A buyer-seller relationship does not require that the buyer disclose information regarding the value of the seller's property. Butts v. Southern Clays, Inc., 215 Ga. App. 110, 450 S.E.2d 244 (1994).

Responsibilities of real estate brokers. — Listing broker was not obligated to communicate to the couple that the home they purchased was slightly smaller

in size than the subdivision's model home the couple wanted duplicated on their lot as the purchase contract plainly stated that the couple had no right to rely on the listing broker as the couple's broker, that the couple had no confidential relationship with the listing broker, and that the couple was solely responsible for protecting the couple's own interests, as the couple was required to exercise due diligence before it could rely on the listing broker's representations and the couple did not do so. Middleton v. Troy Young Realty, Inc., 257 Ga. App. 771, 572 S.E.2d 334 (2002).

Potential buyer did not have a viable common law cause of action for fraud and deceit against a real estate broker and a real estate agent because, as set forth in O.C.G.A. § 10-6A-4(a), no confidential or fiduciary relationship was created between the buyer and the broker and the agent as a matter of law. Harrouk v. Fierman, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

Failure to disclose decision bypassing real estate agent to avoid paying a commission was fraud. — Trial court erred in granting a directed verdict on a real estate agent's fraud claim against an owner for failing to disclose the owner's decision to directly engage a contractor presented to it by the agent, bypassing its commission agreement with the agent. The economic loss rule did not bar the claim. ASC Constr. Equip. USA, Inc. v. City Commer. Real Estate, Inc., 303 Ga. App. 309, 693 S.E.2d 559 (2010).

Failure of insured not to supply health information. — The failure of the insured to supply information as to health problems when no inquiry is made by the insurer or its agents and neither the certificate or master policy of insurance inform the insured that certain illnesses are not covered will not raise a defense of fraud or material misrepresentation in a suit on a credit life insurance policy. Block v. Voyager Life Ins. Co., 251 Ga. 162, 303 S.E.2d 742 (1983).

Expert testimony was required. — Trial court did not err by granting a doctor summary judgment in a medical fraud suit because the suing patient failed to present expert testimony as to whether the pre-surgery x-rays should have put a doctor on notice of a deformity as such a determination was not within a layperson's common understanding and experience and, instead, required expert testimony. Johnson v. Johnson, 323 Ga. App. 836, 747 S.E.2d 518 (2013).

Land purchaser's duty to disclose mineral deposit. — The mere fact that purchaser of land alone had knowledge of a large kaolin deposit does not impose a duty on the purchaser to reveal this information to sellers. One's duty to disclose would arise from the confidential relations of the parties or from the particular circumstances of the case. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992); Butts v. Southern Clays, Inc., 215 Ga. App. 110, 450 S.E.2d 244 (1994).

Withholding information about excavation site. — Withheld information appeared to have been material to a contractor's ability to prepare a responsible bid for a contract to excavate a site, where the withheld reports contained information about the presence of excessive moisture at the site and stated that the standard proctor test should be used rather than the more difficult modified proctor test required by the specifications, and that both the excavations and the fill should be dried before compaction. Such activity would have undoubtedly increased the cost of performance of the contract. Pinkerton & Laws Co. v. Roadway Express, Inc., 650 F. Supp. 1138 (N.D. Ga. 1986).

Evidence was sufficient to create an issue for jury determination as to whether real estate agent fraudulently failed to inform seller that documents executed at closing did not grant him a security interest in purchaser's property, as seller had requested. Welch v. Holley, 191 Ga. App. 532, 382 S.E.2d 128 (1989).

Trial court erred in granting summary judgment to the co-executors in a constructive fraud or conspiracy claim filed by the beneficiaries of an estate because it was necessary for a jury to decide whether the co-executors committed constructive fraud or engaged in a conspiracy. Bloodworth v. Bloodworth, 260 Ga. App. 466, 579 S.E.2d 858 (2003).

Nondisclosure. — Nondisclosure may provide the basis for constructive fraud

where a party is under an obligation to communicate. First Union Nat'l Bank v. Davies-Elliot, Inc., 207 Ga. App. 791, 429 S.E.2d 161 (1993).

Even though a bank had a duty to notify its customer of a change in its signature verification procedures, where there was no evidence that the bank refrained from informing its customers in order to induce them to take or refrain from taking any certain action, there was no showing of constructive fraud. Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

Where a debtor failed to disclose to a creditor that business assets were no longer available to secure a loan upon its renewal, the debt was not dischargeable in bankruptcy because the renewal was obtained by false pretenses. Suntrust Bank v. Brandon (In re Brandon), 297 B.R. 308 (Bankr. S.D. Ga. 2002).

Fraud may exist as much in intentional concealment of material facts as in false statements in regard to facts; one is as fraudulent as the other if it is used as a means of deceiving the opposite party. It was error to grant summary judgment where the facts indicated a deliberate concealment of assets with the possible intent to deprive a creditor of those assets. Miller v. Lomax, 266 Ga. App. 93, 596 S.E.2d 232 (2004).

Jury was properly instructed on fraud under O.C.G.A. § 23-2-53 because the obligation to communicate to a beneficiary by a trustee was not dictated by the existence of a fiduciary relationship and viable claims for constructive fraud had long been recognized in the absence of a fiduciary relationship under the particular circumstances of the case clause. McSweeney v. Kahn, No. 08-16196; No. 08-16515, 2009 U.S. App. LEXIS 20195 (11th Cir. Sept. 10, 2009).

Since the plaintiffs alleged that at the time the plaintiffs purchased the plaintiffs' vehicles, the manufacturer and the distributor failed to disclose to the plaintiffs or to the public the fact that there were underlying safety defects with the gasoline tanks in the models that the plaintiffs purchased, the plaintiffs plausibly alleged that the defendants omitted a material fact that the defendants had a duty to disclose under O.C.G.A. § 23-2-53 as the defects in the gasoline tanks were intrinsic qualities that could not have been discovered through the exercise of ordinary prudence and caution. McCabe v. Daimler AG, No. 1:12-cv-2494-TCB, 2013 U.S. Dist. LEXIS 80161 (N.D. Ga. June 7, 2013).

Trust's account statement failed to disclose straw man transaction with trustee. — Trust's account statement reflecting a sale of the principal asset of the trust was not a "report" because there was insufficient disclosure of the nature of the transaction to trigger the running of the shortened two-year limitation period under O.C.G.A. § 53-12-307(a). Smith v. SunTrust Bank, 325 Ga. App. 531, 754 S.E.2d 117 (2014).

Required elements of fraud not proven. — In an action by buyers of a distributorship of heavy equipment against the manufacturer of the distributorship's main product line, based on concealment of a pending joint venture, the buyers failed to prove the required elements of fraud. Williams v. Dresser Indus., Inc., 120 F.3d 1163 (11th Cir. 1997).

Prima facie case established. — District court found that land vendors presented a prima facie case of intentional fraudulent concealment concerning valuable mineral deposits against land purchasers. McLendon v. Georgia Kaolin Co., 837 F. Supp. 1231 (M.D. Ga. 1993).

A confidential and fiduciary relationship between brothers was not presumed when one of the brothers was aware that the other embezzled substantial amounts of money from their family business and that particular misconduct was the very subject under investigation. Wender & Roberts, Inc. v. Wender, 238 Ga. App. 355, 518 S.E.2d 154 (1999).

Negotiation of stock purchase agreement. — Although the defendants were directors of a corporation, they did not have a fiduciary duty to the plaintiff at the time of the negotiation of a stock purchase agreement; instead, the agreement was an arm's length transaction between persons experienced in the mining business and, therefore, there was no violation of the statute. Bogle v. Bragg, 248 Ga. App. 632, 548 S.E.2d 396 (2001).

Cited in Duncan v. Poythress, 515 F. Supp. 327 (N.D. Ga. 1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); Davis v. Northside Realty Assocs., 165 Ga. App. 96, 299 S.E.2d 186 (1983); Smith v. Ross, 255 Ga. 193, 336 S.E.2d 39 (1985); Clay v. Department of Transp., 198 Ga. App. 155, 400 S.E.2d 684 (1990); Justus v. Justus, 198 Ga. App. 533, 402 S.E.2d 126 (1991); Tower Fin. Serv., Inc. v. Jarrett, 199 Ga. App. 248, 404 S.E.2d 622 (1991); First Union Nat'l Bank v. Gurley, 208 Ga. App. 647, 431 S.E.2d 379 (1993); Mabry v. Pelton, 208 Ga. App. 891, 432 S.E.2d 588 (1993); Saffar v. Chrysler First Bus. Credit Corp., 215 Ga. App. 239, 450 S.E.2d 267 (1994); Garbutt v. Southern Clays, Inc., 894 F. Supp. 456 (M.D. Ga. 1995); Boardman Petro., Inc. v. Federated Mut. Ins. Co., 926 F. Supp. 1566 (S.D. Ga. 1995); American Petro. Prods., Inc. v. Mom & Pop Stores, Inc., 231 Ga. App. 1, 497 S.E.2d 616 (1998); Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007); Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

23-2-54. Surprise as a form of fraud.

JUDICIAL DECISIONS

Attorney for opposing party had no duty to advise of legal rights. — In taxpayers' claim against a purchaser's assignee for rescission of a redemption agreement, the facts did not support rescission. The assignee's attorney did not defraud them or conceal any facts, but advised them to hire an attorney, and any failure to advise them of their legal rights was an opinion as to a matter of law and not a material fact. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

23-2-55. Use of similar trademarks, names, or devices.

JUDICIAL DECISIONS

Analysis

General Consideration

Damages already sustained recoverable. — Plaintiff seeking damages for trade name use infringement may seek recovery for damage already sustained where the illegal use has not ceased. Miller & Meier & Assocs. v. Diedrich, 174 Ga. App. 249, 329 S.E.2d 918, aff'd in part, rev'd in part on other grounds, 254 Ga. 734, 334 S.E.2d 308 (1985).

Cited in Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801 (11th Cir. 1985); Morton B. Katz & Assocs. v. Arnold, 175 Ga. App. 278, 333 S.E.2d 115 (1985).

Prior Use

1. Trade Name

Knowledge of prior use of trade name raises presumption of fraud.

Because plaintiff corporation produced no evidence from which a reasonable jury could have concluded that it had exclusively and continuously used "CCI" as a trade name such that it was entitled to

trade name protection, the corporation's claim for trade name infringement under O.C.G.A. § 23-2-55 was summarily dismissed. Corrpro Cos. v. Meier, No. 3:03-CV-31 (CDL), 2007 U.S. Dist. LEXIS 74897 (M.D. Ga. Oct. 5, 2007).

Unfair Competition

2. Confusing Similarity

Actual confusion. — Promoter presented sufficient evidence of the strength of the promoter's marks and of actual confusion amongst the relevant consumer class to avoid summary judgment, and the appellate court reversed the district court's grant of summary judgment for the group and remanded for trial on the claims of infringement under the Lanham Act, 15 U.S.C. § 1114, false designation of origin under 15 U.S.C. § 1125, deceptive trade practices under O.C.G.A. § 10-1-372 and unfair competition under O.C.G.A. § 23-2-55 et seq., because: (1) the car dealership promoter had shown actual confusion and the district court erred by overvaluing lack of confusion exhibited by the general public; (2) "Slash-It! Sales Event" attained federal incontestable status, so the district court erred in holding that the mark was merely descriptive and not entitled to strong protection; (3) the promoter created a disputed issue of material fact that the slasher slogans left the same impression, weighing in favor of likelihood of confusion; and (4) the similarities between the two sales allowed for the inference that a reasonable consumer could possibly attribute the products here to the same source. Caliber Auto. Liquidators, Inc. v. Premier Chrysler, Jeep, Dodge, LLC, 605 F.3d 931 (11th Cir. 2010).

Confusion found. — Summary judgment was inappropriate as to trademark infringement liability and unfair competition claims because while the "Xylem" mark was at least suggestive, the marks were substantially similar, and the trademark holder documented over 100 instances of actual confusion resulting from misdirected checks, phone calls, faxes, and emails, the court could not find that no reasonable juror would find there was no confusion created by the accused infringer's use of the Xylem name and mark. ITT Corp. v. Xylem Group, LLC, No. 1:11-cv-03669-WSD, 2013 U.S. Dist. LEXIS 109381 (N.D. Ga. Aug. 5, 2013).

3. Proof

A. In General

Plaintiff's established infringement of trade name warranting injunction. — Plaintiffs made requisite showing that trade name reacquired upon foreclosure of their security interest had acquired such a secondary meaning and that defaulting buyers knowingly had adopted a confusingly similar name, which had in fact confused plaintiffs' former customers, thus entitling plaintiffs to injunction. Reis v. Ralls, 250 Ga. 721, 301 S.E.2d 40 (1983).

C. Intent to Deceive

Relief under this section depends upon showing of intent to deceive. However, this intent may be presumed if encroachment is done with knowledge of the prior right. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683 (1981).

Injunctive relief cannot be grounded on this section if the court makes no finding of intent to deceive. Giant Mart Corp. v. Giant Disct. Foods, Inc., 247 Ga. 775, 279 S.E.2d 683 (1981).

Knowing and willing participant in alteration of cellular telephones. — Because plaintiff cellular telephone trademark holder's complaint properly alleged that defendant competitor was a knowing and willing participant in an enterprise that bought the holder's phones in bulk then altered the phones to circumvent prepaid airtime then resold those phones under the holder's marks, the complaint properly stated claims for unfair competition and deceptive trade practices. Tracfone Wireless, Inc. v. Zip Wireless Prods., 716 F. Supp. 2d 1275 (N.D. Ga. 2010).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 78.

23-2-56. Consummation of fraud.

JUDICIAL DECISIONS

Cited in McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982).

23-2-57. Proving existence of fraud.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Section not applicable to suits to set aside judgments. — Rule that fraud may be shown by slight circumstances, contained in this section, is not applicable to suits to set aside judgments. Leventhal v. Citizens & S. Nat'l Bank, 249 Ga. 390, 291 S.E.2d 222 (1982).

Fraud is "in itself subtle," etc.

In accord with bound volume. See McNeil v. Cowart, 186 Ga. App. 411, 367 S.E.2d 291 (1988); Lloyd v. Kramer, 233 Ga. App. 372, 503 S.E.2d 632 (1998).

Cited in Marriott Corp. v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497, 277 S.E.2d 785 (1981); Everson v. Franklin Disct. Co., 248 Ga. 811, 285 S.E.2d 530 (1982); McGaha v. Kwon, 161 Ga. App. 216, 288 S.E.2d 289 (1982); Plough Broadcasting Co. v. Dobbs, 163 Ga. App. 264, 293 S.E.2d 526 (1982); Marshall v. York, 165 Ga. App. 795, 302 S.E.2d 711 (1983); Lenny's, Inc. v. Allied Sign Erectors, Inc., 170 Ga. App. 706, 318 S.E.2d 140 (1984); Macon Chrysler-Plymouth v. Sentell, 179 Ga. App. 754, 347 S.E.2d 639 (1986); Jackson v. Paces Ferry Dodge, Inc., 183 Ga. App. 502, 359 S.E.2d 412 (1987); Graham v. Hogan, 185 Ga. App. 842, 366 S.E.2d 219 (1988); Harden v. Vertex Assocs., 226 Ga. App. 322, 487 S.E.2d 12 (1997); Chandler v. MVM Constr., Inc., 232 Ga. App. 385, 501 S.E.2d 533 (1998); ReMax North Atlanta v. Clark, 244 Ga. App. 890, 537 S.E.2d 138 (2000).

Proving Existence of Fraud

Rarely, if ever, can a fraudulent intent be shown by direct proof, etc.

Proof of fraud is seldom, if ever, susceptible of direct proof; thus, recourse to circumstantial evidence usually is required. Brown v. Mann, 237 Ga. App. 247, 514 S.E.2d 922 (1999).

In every case slight circumstances must be considered, and may be sufficient to establish the existence of fraud, etc.

Since fraud is inherently subtle, slight circumstances of fraud may be sufficient to establish a proper case. Brown v. Mann, 237 Ga. App. 247, 514 S.E.2d 922 (1999).

Evidence of fraud to be of "clear, unequivocal, and decisive" quality. — In a diversity based suit in equity to set aside or deny res judicata effect to a prior state court judgment on the grounds of fraud and mutual mistake, the plaintiffs had to prove their claims by something more than a mere preponderance of the evidence. The evidence had to preponderate in the plaintiffs' favor, but it also had to be of "clear, unequivocal, and decisive" quality. Ahrens v. Katz, 595 F. Supp. 1108 (N.D. Ga. 1984).

Sufficient evidence to create jury issue as to fraud. — See Gibbs v. Jim Wilson Chevrolet Co., 161 Ga. App. 171, 288 S.E.2d 264 (1982); Horne v. Claude Ray Ford Sales, Inc., 162 Ga. App. 329, 290 S.E.2d 497 (1982); Minuteman Press Int'l, Inc. v. Hedrick, 167 Ga. App. 453, 306 S.E.2d 718 (1983).

Where the evidence established that at time automobile was purchased by seller of automobile the certificate of ownership listed 14,229 miles as the car's mileage, that when it was sold by seller to buyer, the odometer read 14,179 miles, and when the buyers test-drove the car the odometer read approximately 7,000 miles, there is considerable conflict regarding the actual mileage of the car, and it is the province of the jury to determine whether seller altered or knew of the alteration of the odometer. Joseph Charles Parrish, Inc. v. Hill, 173 Ga. App. 97, 325 S.E.2d 595 (1984).

Jury could have found that at least some of the numerous repairs a buyer made to a house after discharging a contractor were to correct defects the contractor passively concealed that the buyer could not have reasonably discerned. Since O.C.G.A. § 23-2-57 provides that slight circumstances may be sufficient to prove fraud, the contractor was not entitled to a directed verdict in the contractor's favor on the buyer's fraud claim. Lumpkin v. Deventer N. Am., Inc., 295 Ga. App. 312, 672 S.E.2d 405 (2008).

Trial court erred in granting summary judgment to a surety because jury questions existed as to whether two subcontractors were the same company, whether an owner acted as an agent on behalf of one of those subcontractors when the owner procured the bonds, and whether the bonds were intentionally written fraudulently based on admissions made by counsel for the surety during the hearing. Choate Constr. Co. v. Auto-Owners Ins. Co., 318 Ga. App. 682, 736 S.E.2d 443 (2012).

Evidence insufficient to go to the jury. — In taxpayers' claim against a purchaser's assignee for rescission of a redemption agreement, the facts did not support rescission. The assignee's attorney did not defraud them or conceal any facts, but advised them to hire an attorney, and any failure to advise them of their legal rights was an opinion as to a matter of law and not a material fact. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Pleading and Practice

Evidence necessary to defeat abusive litigation claim. — In a suit for fraud, misrepresentation, and civil conspiracy allegedly arising out of a real estate transaction, and a counterclaim for abusive litigation, where the record revealed hotly contested versions of what the parties considered to have transpired in the complex real estate transaction, given that the law requires only slight circumstances to establish fraud and conspiracy, the trial judge was authorized to find as a matter of law that the plaintiffs had pierced an essential element of the defendant's abusive litigation claim and were thus entitled to the grant of summary judgment thereon. Seckinger v. Holtzendorf, 200 Ga. App. 604, 409 S.E.2d 76, cert. denied, 200 Ga. App. 897, 409 S.E.2d 76 (1991).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Fraudulent Alteration of Odometer, 1 POF2d 677.

23-2-58. Confidential relations defined.

Cross references. — Confidential relationships for purposes of exclusion of evidence, § 24-5-501 et seq.

Law reviews. — For annual survey article discussing wills, trusts and administration of estates, see 52 Mercer L. Rev. 481 (2000). For article, "Georgia's Law of Undue Influence in Gift-Making," see 5 Ga. St. B.J. 12 (2000). For article, "Common Fact Patterns of Stock Broker Fraud

and Misconduct," see 7 Ga. St. B.J. 14 (2002). For survey article on wills, trusts, guardianships, and fiduciary administration for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 459 (2003). For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007). For article, "Holmes v. Grubman: The Supreme Court of Georgia Balances Financial Advisor Common Law Liability and Investor Protection," see 16 (No. 5) Ga. St. B.J. 20 (2011).

JUDICIAL DECISIONS

Analysis

General Consideration

This section is not applicable to confidential relations for the purposes of exclusion of evidence.

Because there was no evidence of a confidential relationship between a manufacturer and a broker beyond the contractual obligation for the broker to post bonds on behalf of the manufacturer, and the broker did not act on the manufacturer's behalf in any business transactions and was obligated only to secure the posting of the needed bonds, it was nothing more than an arms-length transaction, and the trial court's charge to the jury on agency and fiduciary relationships was error. Aon Risk Servs. v. Commercial & Military Sys. Co., 270 Ga. App. 510, 607 S.E.2d 157 (2004).

Confidential relationship distinguished from trade secret. — An item may be considered confidential in the context of a business relationship without rising to the level of a trade secret. A confidential relationship is distinguished by the expectations of the parties involved, while a secret is identified through rigorous examination of the information sought to be protected. Roboserve, Ltd. v. Tom's Foods, Inc., 931 F.2d 789 (11th Cir. 1991).

There is never a presumption, etc.

There is never a presumption of a confidential relationship. The burden is upon the party asserting the same to establish its existence. Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568 (M.D. Ga. 1991), aff'd in part, rev'd in part, 971 F.2d 756 (11th Cir. 1992).

Fiduciary relationship must exist. — In order for this Code section to be applicable, a definite fiduciary relationship must exist between plaintiff and the other party. Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568 (M.D. Ga. 1991), aff'd in part, rev'd in part, 971 F.2d 756 (11th Cir. 1992).

Aiding and abetting breach of fiduciary duty. — Georgia law does not recognize the tort of aiding and abetting a breach of fiduciary duty, and a Georgia court faced with the issue would not be likely to create such a cause of action since the imposition of aider and abettor liability for such breaches essentially extends fiduciary obligations beyond the scope of the confidential or special relationship upon which these duties are based. Munford, Inc. v. Munford, 188 Bankr. 860 (N.D. Ga. 1994), aff'd, 97 F.3d 449 (11th Cir. 1996), 97 F.3d 456 (11th Cir. 1996), aff'd on other grounds, 98 F.3d 604 (11th Cir. 1996).

Therefore, ordinary diligence not required, etc.

In accord with bound volume. See Allen v. Sanders, 176 Ga. App. 647, 337 S.E.2d 428 (1985).

Bankruptcy. — This Code section does not create the kind of trust necessary to create a fiduciary relationship under the federal bankruptcy law. Blashke v. Standard, 123 Bankr. 444 (Bankr. N.D. Ga. 1991).

Cited in Davis v. Carpenter, 157 Ga. App. 875, 278 S.E.2d 758 (1981); McDaniel v. Dykes, 159 Ga. App. 514, 284 S.E.2d 30 (1981); Giordano v. Federal Land Bank, 163 Ga. App. 390, 294 S.E.2d 634 (1982); Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982); Westminster Properties, Inc. v. Atlanta Assocs., 250 Ga. 841, 301 S.E.2d 636 (1983); Schwartz v. Rennie, 185 Ga. App. 638, 365 S.E.2d 159 (1988); Kienel v. Lanier, 190 Ga. App. 201, 378 S.E.2d 359 (1989); Gale v. Hayes Microcomputer Prods., Inc., 192 Ga. App. 30, 383 S.E.2d 590 (1989); Arford v. Blalock, 199 Ga. App. 434, 405 S.E.2d 698 (1991); Wilensky v. Blalock, 262 Ga. 95, 414 S.E.2d 1 (1992); Saffar v. Chrysler First Bus. Credit Corp., 215 Ga. App. 239, 450 S.E.2d 267 (1994); Ledbetter v. Ledbetter, 222 Ga. App. 858, 476 S.E.2d 626 (1996); Longino v. Bank of Ellijay, 228 Ga. App. 37, 491 S.E.2d 81 (1997); Parello v. Maio, 268 Ga. 852, 494 S.E.2d 331 (1998); Conner v. Hart, 252 Ga. App. 92, 555 S.E.2d 783 (2001); Duncan v. Moore, 275 Ga. 656, 571 S.E.2d 771 (2002); Douglas v. Bigley, 278 Ga. App. 117, 628 S.E.2d 199 (2006); Hendry v. Wells, 286 Ga. App. 774, 650 S.E.2d 338 (2007); Saye v. Unumprovident Corp., No. 1:07-CV-31-TWT, 2007 U.S. Dist. LEXIS 58901 (N.D. Ga. Aug. 9, 2007).

Confidential Relations Generally

1. In General

This section does not attempt to comprehensively enumerate, etc.

In accord with bound volume. See Vitner v. Funk, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

The mere fact that one reposes trust and confidence, etc.

In accord with first paragraph in bound volume. See Anderson Chem. Co. v. Portals Water Treatment, Inc., 768 F. Supp. 1568 (M.D. Ga. 1991); Bowen v. Hunter, Maclean, Exley & Dunn, 241 Ga. App. 204, 525 S.E.2d 744 (1999); Burgess v. Coca-Cola Co., 245 Ga. App. 206, 536 S.E.2d 764 (2000).

Although the plaintiffs offered evidence demonstrating that defendant was their personal friend and had conducted business with them on matters not relating to investments, this evidence is not sufficient to establish a confidential relationship between the parties so as to justify the plaintiffs reposing trust in defendant. Garland v. Advance Med. Funding L.P., 86 F. Supp. 2d 1195 (N.D. Ga. 2000).

Statements made by a corporate officer and owner to investors of a mortgage company that the officer would be obligated on each and every loan and would personally manage their money and be involved with the management of the company did not create a confidential relationship; additionally, the investors had their own financial advisor. Albee v. Krasnoff, 255 Ga. App. 738, 566 S.E.2d 455 (2002).

Factual question as to whether confidential relationship existed. — Trial court did not err in denying the motion for summary judgment filed by a corporation's general counsel/vice-president because questions of fact existed regarding the existence of a confidential relationship between the general counsel/vice-president and the investors, which were for a jury to decide. Cushing v. Cohen, 323 Ga. App. 497, 746 S.E.2d 898 (2013).

Existence or reliance on relationship issue for jury. — Whether a confidential relationship existed between plaintiff and his employer's agents, and whether plaintiff justifiably relied on representations regarding group insurance coverage, were questions for the jury. Capriulo v. Bankers Life Co., 178 Ga. App. 635, 344 S.E.2d 430 (1986).

A confidential relationship is distinguished by the expectations of the parties involved, while a trade secret is identified through rigorous examination of the information sought to be protected. The jury is empowered to decide whether a confidential relationship exists under the facts of a particular case. Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441 (11th Cir. 1991).

2. Specific Relationships

Attorney-client relationship. — There was insufficient evidence to establish that the attorney for the purchaser of land was also the attorney for the sellers during the time of the transactions at issue. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992).

Confidential Relations
Generally (Cont'd)
2. Specific Relationships (Cont'd)

Trial court erred in granting summary judgment with respect to a client's breach of fiduciary duty claim, which was not a mere duplication of the legal malpractice claim that was based on the establishment of a fiduciary, attorney-client relationship that was breached, as: (1) material fact issues remained as to whether an attorney-client relationship existed between the client and the attorney; (2) the question of legal malpractice remained an issue; and (3) the client had the right to plead alternative theories, and the jury should be permitted to decide the breach of fiduciary duty claim should they find no attorney-client relationship existed. Both v. Frantz, 278 Ga. App. 556, 629 S.E.2d 427 (2006).

Creditors' 11 U.S.C. § 523(a)(4) claim against a Chapter 13 debtor, their attorney, was dismissed for failure to state a claim, as the creditors failed to allege a contract or other agreement establishing a technical trust, but instead cited O.C.G.A. § 23-2-58, which the court held did not establish fiduciary capacity, as the statute did not designate trust property or impose trust duties. Further, none of the Georgia Rules of Professional Conduct cited by the creditors, Ga. St. Bar R. 4-102(d):1.1, 1.3, 1.6, and 1.7(a), mentioned trust property and thus, those rules were ineffective to establish fiduciary capacity for purposes of 11 U.S.C. § 523(a)(4). Crisler v. Farr (In re Farr), No. 11-1009, 2011 Bankr. LEXIS 1875 (Bankr. M.D. Ga. May 18, 2011).

Accountant and client. — When a company sued its accountants for breach of fiduciary duty regarding a sale of the company's assets, summary judgment was properly granted in favor of the accountants because the evidence was insufficient to create a factual dispute as to whether the accountants exercised a controlling influence over the will, conduct, and interest of the company, as required under O.C.G.A. § 23-2-58 for a fiduciary relationship to arise. R.W. Holdco, Inc. v. Johnson, 267 Ga. App. 859, 601 S.E.2d 177 (2004).

Bank and its customers. — There is no confidential relationship between a bank and its customers merely because the customer had advised with, relied upon, and trusted the bankers in the past. Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 334 S.E.2d 926 (1985); Russell v. Barnett Banks, Inc., 241 Ga. App. 672, 527 S.E.2d 25 (1999).

The trial court correctly determined that there was no evidence of special circumstances imposing upon the bank the duties of a fiduciary in favor of borrowing petroleum companies such that summary judgment as to any claim for breach of fiduciary duty was correct. Russell Corp. v. BancBoston Fin. Co., 209 Ga. App. 660, 434 S.E.2d 716 (1993).

Trial court did not err in granting judgment on the pleadings to a bank as to a customer's claim for breach of a duty of confidentiality because the customer failed to assert in the complaint facts showing that the bank owed the customer a confidential duty or invaded the customer's privacy, and the customer did not plead any special circumstances showing that the customer had a particular relationship of trust or mutual confidence with the bank; the bank-customer relationship is not confidential. Jenkins v. Wachovia Bank, N.A., 314 Ga. App. 257, 724 S.E.2d 1 (2012).

Businessmen.

The entire business structure of the parties, their interactions and dealings over the course of several years, and their common goal all furnished a basis for a jury to find a relationship in fact which justified the reposal of confidence on the part of one party and good faith on the part of the others. Vitner v. Funk, 182 Ga. App. 39, 354 S.E.2d 666 (1987).

Facts would not support finding a confidential relationship between real estate developers and a supermarket regarding their shared goal of finding a site and constructing a shopping center in which the supermarket would lease space, where the parties fought over the terms of the lease agreement for approximately six months. Doll v. Grand Union Co., 925 F.2d 1363 (11th Cir. 1991).

Relationship between the parties, close and lengthy as it might have been, was

merely a business relationship between two independent concerns; therefore, no fiduciary duties were created. Automated Solutions Enters. v. Clearview Software, Inc., 255 Ga. App. 884, 567 S.E.2d 335 (2002).

Parties' merger agreement and post-merger relationship did not establish a confidential or fiduciary relationship between the parties since the plaintiff did not exercise sole and exclusive control over the termination of a lease held by the defendant; also, the mere fact that the plaintiff's signature was required on instructions to the escrow agent for the release of escrow funds did not establish a confidential relationship. Interland, Inc. v. Bunting, No. 1:04-CV-444-ODE, 2005 U.S. Dist. LEXIS 36112 (N.D. Ga. Mar. 31, 2005).

Evidence that an appellant breached an agreement with the appellee; was unjustly enriched by keeping the profits of the parties' business during the months the appellee was entitled to operate it; and committed civil conspiracy when, in concert with the parties' lessor, prevented the appellee from operating the business, supported an award of lost profit damages to the appellee. Asgharneya v. Hadavi, 298 Ga. App. 693, 680 S.E.2d 866 (2009), overruled on other grounds, Jordan v. Moses, 291 Ga. 39, 727 S.E.2d 460 (2012).

Genuine issues of fact existed as to whether fiduciary duty owed between business people. — Trial court erred by granting summary judgment to the defendants on the part owner's claim for breach of contract because there were genuine questions of fact regarding whether the defendants owed the part owner a fiduciary duty, whether the defendants breached the duty, and whether any breach proximately caused the part owner damage. Bedsole v. Action Outdoor Adver. JV, LLC, 325 Ga. App. 194, 750 S.E.2d 445 (2013).

Business relationship. — Trial court erred by denying summary judgment to a subcontractor on the contractor's breach of fiduciary claim because the evidence did not raise an issue of fact regarding the existence of a special agency or any other confidential relationship between the parties as the business relationship was an arms-length one and even adversarial. UWork.com, Inc. v. Paragon Techs., Inc., 321 Ga. App. 584, 740 S.E.2d 887 (2013).

Members of a partnership or an LLC undoubtedly shared a special relationship under Georgia law, but the fiduciary relationship addressed in the Bankruptcy Code exception to discharge had to be demonstrated by evidence of an express trust. Keys v. Allen (In re Allen), 2013 Bankr. LEXIS 5084 (Bankr. N.D. Ga. Oct. 25, 2013).

Manager of joint venture. — Trial court did not err in denying a manager's motion for summary judgment as to the joint venturers' counterclaim for breach of fiduciary duty because questions of fact existed regarding whether the manager exercised good faith by depleting the business funds and suspending distributions. Maree v. ROMAR Joint Venture, 329 Ga. App. 282, 763 S.E.2d 899 (2014).

Clergyman and parishioner.

Whether a wife consented to the sexual relationship would be irrelevant when the bishop was, by virtue of the bishop's confidential relationship, in a position to manipulate the wife into giving that consent by not only being a bishop but also the wife's employer. Brewer v. Paulk, 296 Ga. App. 26, 673 S.E.2d 545 (2009).

Employer and employee.

Where assurances between a real estate broker and his former real estate director, an at-will employee, would not have been made but for the prior employer-employee relationship, and because they were not made while the relationship existed, the assurances did not cause the employer and employee relationship to evolve into a fiduciary relationship. Atlanta Mkt. Ctr. Mgt. Co. v. McLane, 269 Ga. 604, 503 S.E.2d 278 (1998).

Where there was no evidence showing that employees could create obligations on behalf of their employer or bring third parties into contractual relations with it, they were not agents owing a fiduciary duty to the employer. Physician Specialists in Anesthesia, P.C. v. Wildmon, 238 Ga. App. 730, 521 S.E.2d 358 (1999).

Evidence that a former executive officer of a product development company, while still employed, pursued opportunities in the same market for the officer's own

Confidential Relations
Generally (Cont'd)
2. Specific Relationships (Cont'd)

benefit, to the company's detriment, and appropriated a presentation and its information, showed a triable issue as to a confidential relationship under O.C.G.A. § 23-2-58. Glades Pharms., LLC v. Murphy, 2005 U.S. Dist. LEXIS 36198 (N.D. Ga. Dec. 16, 2005).

There is little question that a former employee's relationship with the employer was one which required confidence under O.C.G.A. § 23-2-58. The undisputed evidence showed that the employee was intimately involved in the negotiations leading up to and the continuous administration of the contracts with a contractor; not only was the employee responsible for bringing the contractor to the employer, the employee was charged with supervision and inspection of the contractor's contract work. GIW Indus. v. JerPeg Contr., Inc., 530 F. Supp. 2d 1323 (S.D. Ga. 2008).

On a breach of fiduciary duty claim against a former employee concerning the employee's alleged solicitation of the employee's co-workers, the trial court did not err in granting summary judgment in favor of the employee because, even assuming that the employee had the authority to bind the employer with respect to customer contracts, there was no evidence that the employee had the authority to bind the company on employment matters or relations. Thus, although the employee may have owed the company a fiduciary duty with respect to the customer contracts the employee entered into on its behalf, there was no evidence that the employee occupied a similar confidential relationship with respect to employee relations. Gordon Document Prods. v. Serv. Techs., 308 Ga. App. 445, 708 S.E.2d 48 (2011).

Trial court properly denied a personal assistant's motion for a directed verdict on a couple's claim for breach of fiduciary duty based upon the assistant's withdrawal of $49,000 remaining in a joint account held with the wife because there was evidence that the assistant was not entitled to any portion of that account since the assistant was a fiduciary only. Lee v. Choi, 323 Ga. App. 370, 744 S.E.2d 871 (2013).

Employee benefit plan claims administrator and utilization review provider. — No fiduciary duty existed between a participant in an employee benefit health plan and the claims administrator for the plan or an independent plan medical utilization review provider; therefore, the participant could not assert a claim for breach of fiduciary duty against the claims administrator or the review provider. Monroe v. Bd. of Regents of the Univ. Sys., 268 Ga. App. 659, 602 S.E.2d 219 (2004).

Executor and legatee.

Business did not have a confidential relationship with a corporation where the parties had similar but separate business objectives that did not merge into a common business objective; the business's insistence on status as a platform company was inconsistent with a confidential relationship because a bid prepared by the business with another company was not evidence of such a relationship, even though the corporation's president was an officer in the other company, as there was no showing that the corporate entities should be disregarded. Infrasource, Inc. v. Hahn Yalena Corp., 272 Ga. App. 703, 613 S.E.2d 144 (2005).

Trial court properly denied the motions for a directed verdict and for a judgment notwithstanding the verdict filed by the executors of a will and trust because there was sufficient evidence to support the jury's finding that the documents were invalid as a product of undue influence based on the executors taking complete control of the elderly testator and isolating the testator from the testator's sons, as well as substituting the executors' desires and having the testator sign a new will and trust, which benefitted the executors and excluded the testator's wife and sons. Davison v. Hines, 291 Ga. 434, 729 S.E.2d 330 (2012).

Friendship.

Evidence was sufficient to support a jury's finding that there was a confidential relationship pursuant to O.C.G.A. § 23-2-58 between an attorney, who was dying of leukemia, and the attorney's for-

mer client and friend, from whom the attorney sought to borrow money on the attorney's life insurance policy. Stamps v. JFB Props., LLC, 287 Ga. 124, 694 S.E.2d 649 (2010).

Lender's claims against borrowers for discharge of documents the lender signed without reading, which discharged a $1.2 million note and released the lender's security interest in the borrowers' property, were subject to summary judgment. The lender's close, personal friendship with the borrowers did not create a confidential relationship under O.C.G.A. § 23-2-58 and did not excuse the lender's failure to read the documents. Arko v. Cirou, 305 Ga. App. 790, 700 S.E.2d 604 (2010).

Boyfriend and girlfriend. — The trial court did not err in denying a boyfriend a directed verdict on a fraud in the inducement claim asserted by the boyfriend's girlfriend, given evidence of the personal nature of their relationship which caused the girlfriend to place trust and confidence in the boyfriend's repeated promises of marriage and believe that the boyfriend was acting in the girlfriend's best interest by taking the monies loaned to use for a business, which would ultimately allow the boyfriend to repay the girlfriend and support them after they were married. Tankersley v. Barker, 286 Ga. App. 788, 651 S.E.2d 435 (2007), cert. denied, 2007 Ga. LEXIS 742 (Ga. 2007).

Husband and wife. — It is plain that under Georgia law a confidential relationship exists between husband and wife. ITT Com. Fin. Corp. v. Dilkes (In re Analytical Sys.), 113 Bankr. 91 (N.D. Ga. 1990), rev'd on other grounds, 933 F.2d 939 (11th Cir. 1991).

Wife's personal injury action against her husband arising from the husband's infection of the wife with genital herpes was not barred by statute of limitations; the parties enjoyed a confidential relationship pursuant to O.C.G.A. § 23-2-58, and thus, the wife was entitled to repose confidence and trust in the husband, and because the husband failed to admit the truth to the wife, he was guilty of a false representation and that falsehood deterred the wife from instituting suit and tolled the statute of limitation. Beller v. Tilbrook, 275 Ga. 762, 571 S.E.2d 735 (2002).

Wife could not claim that she had a confidential relationship with her husband when she signed a prenuptial agreement, thereby relieving the wife of any obligation to verify the agreement's representations, because when the wife signed the agreement they were not married, so the confidential relationship applicable to husbands and wives did not exist and, under Georgia law, there was no such relationship applicable to putative spouses. Mallen v. Mallen, 280 Ga. 43, 622 S.E.2d 812 (2005).

Husband, his father, and the father's friend were not entitled to summary judgment in an action by the Securities Exchange Commission against them for insider trading under 17 C.F.R. § 240.10b-5 because a reasonable factfinder could conclude that the husband violated a fiduciary duty to his wife under O.C.G.A. § 23-2-58 by disclosing information about the wife's employer, leading to his father and the friend purchasing stock options in the wife's employer on the basis of material, non-public information. United States SEC v. Goodson, No. 1:99-cv-2133-MHS, 2001 U.S. Dist. LEXIS 26493 (N.D. Ga. Mar. 6, 2001).

Insurance agent and non-insured. — Summary judgment was properly awarded the insurer with respect to a fraud claim where the record was devoid of any evidence from which to conclude that a confidential relationship existed between insurance agent and plaintiff who was neither a party to the insurance contract, a named insured, nor an owner of the vehicle. Clark v. Superior Ins. Co., 209 Ga. App. 290, 433 S.E.2d 394 (1993).

Insurance agent and insured. — When an insured sued an insurance agent for fraud and breach of fiduciary duty because the agent allegedly misrepresented the coverage afforded by a policy the insured purchased through the agent, the insured did not show the presence of a confidential relationship with the agent which would have negated the insured's duty to read the policy the insured purchased because: (1) the insured knew what kind of insurance coverage the insured wanted when approaching the agent, so the insured did not rely on the agent's expertise to obtain the correct in-

Confidential Relations
Generally (Cont'd)
2. Specific Relationships (Cont'd)

surance; and (2) the insured's past dealings with and trust in the agent did not create a confidential relationship. Canales v. Wilson Southland Ins. Agency, 261 Ga. App. 529, 583 S.E.2d 203 (2003).

Wife and agent. — Defendant, as decedent's wife and agent under the power of attorney, enjoyed a relationship with decedent which was both confidential and fiduciary in nature. Wheeless v. Gelzer, 780 F. Supp. 1373 (N.D. Ga. 1991).

Lender and borrower. — There is no confidential relationship between lender and borrower for they are creditor and debtor with clearly opposite interests. Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 334 S.E.2d 926 (1985).

Mortgagee and mortgagor. — There is no confidential relationship between mortgagee and mortgagor for they are creditor and debtor with clearly opposite interests. Pardue v. Bankers First Fed. Sav. & Loan Ass'n, 175 Ga. App. 814, 334 S.E.2d 926 (1985).

Mortgage companies were not liable for a breach of fiduciary duty to real estate investors whose credit scores allegedly were injured after the companies' failure to timely pay a tax bill triggered the filing of a county tax lien and after they erroneously reported having foreclosed a mortgage granted to the investors because the investors failed to show the existence of a confidential relationship between the parties within the meaning of O.C.G.A. § 23-2-58. Burch v. Chase Manhattan Mortg. Corp., No. 1:07-CV-0121-JOF, 2008 U.S. Dist. LEXIS 76595 (N.D. Ga. Sept. 15, 2008).

Hospital and patient. — In an action between a group of uninsured patients and a non-profit hospital in which the patients alleged, among other things, a breach of fiduciary duty, absent authority recognizing a fiduciary relationship between a hospital and a patient with respect to the prices the hospital charged, said claim was properly dismissed. Cox v. Athens Reg'l Med. Ctr., Inc., 279 Ga. App. 586, 631 S.E.2d 792 (2006).

Partners.

Summary judgment was not appropriate for a guaranty partner's allegations that an investment bank partner, which was also a creditor of the partnership, breached its fiduciary duty towards the guaranty partner by using coercive and deceptive tactics in its efforts to restructure the partnership because a jury question existed as to whether the investment bank partner breached its fiduciary duty owed to the guaranty partner. AAF-McQuay, Inc. v. Willis, 308 Ga. App. 203, 707 S.E.2d 508 (2011).

Court of appeals erred in granting an attorney's motion for summary judgment in the court's action to dissolve a partnership because the court cited disapproved language that the tort of wrongful dissolution of a partnership required the attempt to appropriate the "new prosperity" of the partnership; the gravamen of a wrongful dissolution claim is a partner's attempt to appropriate, through the dissolution, the assets or business of the partnership, which may include prospective business, without adequate compensation to the remaining partners. Jordan v. Moses, 291 Ga. 39, 727 S.E.2d 460 (2012).

Franchisor and franchisee. — A franchise contract did not create a confidential relationship between the franchisor and franchisee. Allen v. Hub Cap Heaven, Inc., 225 Ga. App. 533, 484 S.E.2d 259 (1997).

Principal and agent, etc.

Should the jury find that an agency relationship existed between an insurance agent and an insurance applicant, the jury would be required further to treat that relationship as a fiduciary relationship. Stewart v. Boykin, 165 Ga. App. 868, 303 S.E.2d 50 (1983).

An agent can do nothing more disloyal to his principal than contacting his principal's employer and taking over the latter's position with the company. Koch v. Cochran, 251 Ga. 559, 307 S.E.2d 918 (1983).

One of the areas where the law finds a confidential or fiduciary relationship is in the case of principal and agent. Tigner v. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 411 S.E.2d 800 (1991).

Fiduciary relationship was created be-

tween a brokerage firm and a mentally disabled client, where the firm exercised a "controlling influence" over the client and had accepted his account with the understanding that he needed complete guidance in the management and handling of his money. Tigner v. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 411 S.E.2d 800 (1991).

Where cotenant was a relative to the other heirs and acted as agent for the purchaser of land during the sale, the agent's confidential relationship with the other heirs was imputed to the purchaser; and a jury could find that the purchaser, through the agent's confidential relationship with the other heirs, was so situated as to exercise a controlling influence over the will, conduct, and interest of the other heirs. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992).

Inquiry of manufacturer's customers whether, in the event representative (agent) left the appellant's employment in the future, they would consider continuing to place their orders through him did not result in profit at manufacturer's expense during his actual employment. Nilan's Alley, Inc. v. Ginsburg, 208 Ga. App. 145, 430 S.E.2d 368 (1993).

In a breach of fiduciary duty and fraud action wherein an investment company obtained a jury verdict in the company's favor against a site manager, the manager's spouse, and others, the trial evidence supported the conclusion that a fiduciary relationship arose between the site manager and the investment company as the investment company entrusted significant financial responsibility and authority to the site manager, who engaged in a financial kickback scheme diverting thousands of dollars from the investment company. Wright v. Apt. Inv. & Mgmt. Co., 315 Ga. App. 587, 726 S.E.2d 779 (2012).

Insurance agent and insured. — A confidential relationship did not exist between an insured and his agent which would have enabled the insured to place trust and reliance on oral representations by the agent, inconsistent with the terms of the form. The mere fact that one reposes trust and confidence in another does not create a confidential relationship. Trulove v. Woodmen of World Life Ins. Soc'y, 204 Ga. App. 362, 419 S.E.2d 324 (1992).

Purchaser of automobile and financer. — Purchaser of automobile has no confidential relationship with the financer of the purchase. Doxie v. Ford Motor Credit Co., 603 F. Supp. 624 (S.D. Ga. 1984).

Parent and child. — In a wrongful death case, the surviving spouse acts as the children's representative and owes them the duty to act prudently in asserting, prosecuting and settling the claim and to act in the utmost good faith. Home Ins. Co. v. Wynn, 229 Ga. App. 220, 493 S.E.2d 622 (1997).

Buyer and seller. — Directed verdict for the seller on the buyers' breach of confidential relationship claim was reversed because there was a fact issue as to whether the seller exercised a controlling influence over the buyers in their application for mobile home permit such that the buyers were kept from discovering zoning for the property or that the seller had an increased duty to disclose the zoning. Howard v. Barron, 272 Ga. App. 360, 612 S.E.2d 569 (2005).

Tenants in common. — Purchaser of land had no duty to disclose its knowledge of a kaolin deposit to seller by virtue of its relationship as a tenant in common, since the confidential relationship between cotenants does not extend to encompass the circumstance of one tenant purchasing another cotenant's interest. McLendon v. Georgia Kaolin Co., 782 F. Supp. 1548 (M.D. Ga. 1992).

Purchaser of property and real estate investing company. — Since plaintiff's decision to buy property was based on plaintiff's confidence that it could be used in the way defendant suggested and that defendant would rent the property on plaintiff's behalf as defendant agreed to do, a jury issue existed regarding whether the parties were in a confidential relationship at the time of the alleged fraud. Yarbrough v. Kirkland, 249 Ga. App. 523, 548 S.E.2d 670 (2001).

Resident. — Trial court did not err in granting a homeowners' association summary judgment on a resident's claim of breach of fiduciary duty because the resident's mere reliance upon status as a

Confidential Relations
Generally (Cont'd)
2. Specific Relationships (Cont'd)

resident of the development, without more, failed to establish a fiduciary or confidential relationship. Campbell v. Landings Ass'n, 311 Ga. App. 476, 716 S.E.2d 543 (2011).

Mining leases. — Royalty leases for the mining of kaolin were not shown to have been intended to place the parties in a confidential relationship, and the presumption remained that the agreements were entered at arm's length between persons on equal footing. Manning v. Engelhard Corp., 929 F. Supp. 1508 (M.D. Ga. 1996), aff'd, 111 F.3d 897 (11th Cir. 1997).

Investors and bank. — Breach of fiduciary duty action filed by two investors against a bank was dismissed by summary judgment because, according to the terms of an investment agreement, there was no such relationship between the parties; further, there was no evidence that the bank exercised a controlling influence over the investors' will, conduct, or interests nor did the investors establish that they relied upon the bank to make decisions on their behalf. Newitt v. First Union Nat'l Bank, 270 Ga. App. 538, 607 S.E.2d 188 (2004).

Creditors failed to prove the existence of a technical trust, either by contract or by O.C.G.A. §§ 14-11-301(1), 14-11-305(1), or 23-2-58, and, as a consequence, could not prove a fiduciary defalcation by the debtors. Thus, any debt arising from the debtors' management of a limited liability company was dischargeable under 11 U.S.C. § 523(a)(4). Tarpon Point, LLC v. Wheelus (In re Wheelus), No. 07-30114-JDW, 2008 Bankr. LEXIS 348 (Bankr. M.D. Ga. Feb. 11, 2008).

Stockbroker and stockholder. — In response to a certified question asking whether, under Georgia law, a brokerage firm owed a fiduciary duty to the holder of a non-discretionary account, the supreme court answered that the fiduciary duties owed by a broker to a customer with a non-discretionary account were not restricted to the actual execution of transactions; the broker will generally have a heightened duty, even to the holder of a non-discretionary account, when recommending an investment which the holder has previously rejected or as to which the broker has a conflict of interest. Holmes v. Grubman, 286 Ga. 636, 691 S.E.2d 196 (2010).

Presumption of Undue Influence

Evidence of confidential relationship raises presumption of undue influences.

Trial court erred in giving a jury instruction that stated that the jury could infer that undue influence existed if it found a confidential relationship was present; the testator made a gift of realty, and the testator was in a weakened mental state and feeble-minded, so the jury was entitled under those circumstances to presume, not merely infer, that undue influence had been shown. White v. Regions Bank, 275 Ga. 38, 561 S.E.2d 806 (2002).

Evidence presented by a testator's child, which proved the testators's disease, medication, and its effects, the testator's dependence on the care givers, their isolation of the testator from the child; their active encouragement and arrangements for the drafting and execution of a new will, the testator's short-term relationship with them, the testator's sporadic contact with and lack of trust towards one of the challenged beneficiaries, and the testator's long-standing expressions of testamentary intent to leave all of the testator's property to the child, which the testator repeated the day after execution of the disposition, supplied sufficient evidence to support the child's claim of undue influence to support the jury verdict in the child's favor and not a directed verdict entered by the trial court in the face of this evidence; although this evidence did not demand a finding that the will was the product of undue influence, it was sufficient to authorize the submission of that question to the jury. Bailey v. Edmundson, 280 Ga. 528, 630 S.E.2d 396 (2006).

A trial court correctly denied an executor's motion for directed verdict in an action wherein the child of the testator

filed a caveat and objection to the probate of the testator's last will and testament on the grounds that the will was the product of undue influence as sufficient evidence existed to support the conclusion that undue influence was used to have the testator bequeath the only asset, namely a home, to the caregiver who was hired by the executor. The record established that the executor blocked calls from the testator's child, refused to let the child see the testator, and a confidential relationship was established between the caregiver and the testator as the caregiver took an active role in the planning, preparation, and execution of the will. Bean v. Wilson, 283 Ga. 511, 661 S.E.2d 518 (2008).

RESEARCH REFERENCES

Am. Jur. Proof of Facts. — Interference with Attorney-Client Relationship, 19 POF2d 335.

Existence of Attorney-Client Relationship, 48 POF2d 525.

23-2-59. Acquisition of antagonistic rights by one in confidential relationship.

Law reviews. — For annual survey of law of wills, trusts, guardianships, and fiduciary administration, see 56 Mercer L. Rev. 457 (2004).

JUDICIAL DECISIONS

Competing with principal after agency terminates. — The principles of agency will not sustain grant of an injunction prohibiting competition after agency relationship is terminated. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982).

In absence of evidence of a restrictive covenant in employment contract, trial court erred in enjoining employee from soliciting business for himself from eight customers to whom he had sold similar products for his employer. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982).

No breach of duty where all partners enter into agreement at same time. — This Code section, when construed in conjunction with § 14-8-21, applies only to partnership rights acquired by one partner without the consent of the other partners. Thus, where all limited partners and the general partner acquired their rights at the same time by entering into an agreement, there was no breach of fiduciary duty. Consolidated Equities Corp. v. Bird, 195 Ga. App. 45, 392 S.E.2d 276 (1990).

Writing requirement for post-employment covenant. — In order to be valid a post-employment covenant against competition by an employee who is not an officer or director must be in writing. Pope v. Kem Mfg. Corp., 249 Ga. 868, 295 S.E.2d 290 (1982).

Cited in Westminster Properties, Inc. v. Atlanta Assocs., 250 Ga. 841, 301 S.E.2d 636 (1983); Hanson v. First State Bank & Trust Co., 259 Ga. 710, 385 S.E.2d 266 (1989).

23-2-60. Annulment of conveyances for fraud.

Fraud will authorize equity to annul conveyances, however solemnly executed. (Orig. Code 1863, § 3109; Code 1868, § 3121; Code 1873, § 3178; Code 1882, § 3178; Civil Code 1895, § 4032; Civil Code 1910, § 4629; Code 1933, § 37-709; Ga. L. 1986, p. 294, § 4.)

The 1986 amendment, effective July 1, 1986, deleted ", and to relieve against awards, judgments, and decrees obtained by imposition" at the end of the sentence.

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in Wessinger v. Spivey (In re Galbreath), 475 B.R. 749 (Bankr. S.D. Ga. 2003).

RESEARCH REFERENCES

ALR. — Rule denying recovery of property to one who conveyed to defraud creditors as applicable where the claim which motivated the conveyance was never established, 6 ALR4th 862.

ARTICLE 4

ACCOUNTING OF CONTRIBUTION; APPORTIONMENT; SETOFF

23-2-70. Scope of equity jurisdiction over matters of account.

JUDICIAL DECISIONS

Analysis

General Consideration
Complicated and Intricate Accounts

General Consideration

Right to attorney fees. — Because there were no excess proceeds from the foreclosure sale to which a condominium association would have been entitled, and regardless of whether it was the owner of the condominium at the time of the foreclosure it was not entitled to an equitable accounting, the association was also properly denied attorney fees under O.C.G.A. § 13-6-11 resulting from the bank's failure to provide an equitable accounting. Riverview Condo. Ass'n v. Ocwen Fed. Bank, FSB, 285 Ga. App. 7, 645 S.E.2d 5 (2007), cert. denied, No. S07C1254, 2007 Ga. LEXIS 705 (Ga. 2007).

When transfer of accounting case from Supreme Court to Court of Appeals mandatory.

Borrower was not entitled to an equitable accounting because the borrower failed to allege facts sufficient to show that the borrower lacked an adequate remedy at law to ascertain the amount due on the borrower's loan. Phillips v. Ocwen Loan Servicing, LLC, No. 1:12-cv-3861-WSD, 2013 U.S. Dist. LEXIS 129721 (N.D. Ga. Sept. 10, 2013).

Cited in Meredith v. Smith & Shiver, 157 Ga. App. 522, 277 S.E.2d 805 (1981); Faircloth v. A.L. Williams & Assocs., 219 Ga. App. 560, 465 S.E.2d 722 (1995); HAAC Chile, S.A. v. Bland Farms, LLC, No. 606CV086, 2008 U.S. Dist. LEXIS 81859 (S.D. Ga. Aug. 26, 2008).

Complicated and Intricate Accounts

Facts rendering equitable accounting proper.

Equitable accounting was unavailable absent allegations that the accounts were particularly complicated or that the amount owed could not be determined through the discovery process. Ralls Corp.

v. Huerfano River Wind, LLC, 27 F. Supp. 3d 1303 (N.D. Ga. 2014).

23-2-71. Entitlement to contribution; when equity has jurisdiction.

JUDICIAL DECISIONS

When contribution can be granted as relief. — Contribution cannot properly be granted as affirmative relief unless the party claiming such relief has been compelled to discharge a liability for which he and the other party were equally bound. Klausman v. Klausman, 186 Ga. App. 669, 368 S.E.2d 185, cert. denied, 186 Ga. App. 918, 368 S.E.2d 185 (1988).

Relationship of joint tort-feasors required for right to contribution. — In an action by tenants' insurers against suppliers of building materials for losses due to fire damage to the building, the suppliers did not have a right to contribution from the landlord since the tenants and the landlord had agreed in leases not to sue each other before for losses covered by insurance; thus, no cause of action by the insurers against the landlord ever arose and the landlord could not be a joint tort-feasor with the suppliers. Glazer v. Crescent Wallcoverings, Inc., 215 Ga. App. 492, 451 S.E.2d 509 (1994).

Prerequisite to contribution.

Trial court properly granted partial summary judgment to the former business partners on the separate entity partners' counterclaim that the separate entity partners were owed money due to the former business partners' alleged failure to pay their share of a settlement agreement entered into after a franchiser filed separate suits seeking unpaid royalties; nothing of record showed that either of the separate entity partners paid any portion of the settlement and, in fact, the record showed that the corporation formed by the former business partners and the separate entity partners paid it. Carter v. Parish, 274 Ga. App. 97, 616 S.E.2d 877 (2005).

When right to contribution arises.

Debtor established that a defendant was liable to the debtor for a joint and several liability pursuant to O.C.G.A. § 23-2-71 because plaintiff had shown that both parties were co-obligors on the debts of two creditors, that plaintiff had paid the entirety of the debts, and that defendant was liable for a contribution from defendant. Citrico Int'l, Ltd. v. Citrico, Inc. (In re Citrico Int'l, Ltd.), No. 04-73442-MGD, 2009 Bankr. LEXIS 423 (Bankr. N.D. Ga. Jan. 26, 2009).

Co-debtors and sureties distinguished. — Cases interpreting O.C.G.A. § 23-2-71 distinguish between a co-debtor, who is entitled to contribution upon payment of the debt, and a surety, who is legally subrogated to the rights of the creditor and is entitled to sue on the original indebtedness upon payment of the debt. Johnson v. AgSouth Farm Credit, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

Co-employee's liability for contribution to third party. — The exclusive remedy provision of the Worker's Compensation Act precludes a defendant in a personal injury action from asserting a third-party contribution claim against a co-employee of the plaintiff; reversing Brown v. Weller, 217 Ga. App. 67, 456 S.E.2d 602 (1995). Weller v. Brown, 266 Ga. 130, 464 S.E.2d 805 (1996).

Cited in George R. Hall, Inc. v. Superior Trucking Co., 532 F. Supp. 985 (N.D. Ga. 1982); Hopkins v. Hopkins, 186 Ga. App. 530, 367 S.E.2d 825 (1988); Ragsdale v. Bank S. (In re Whitacre Sunbelt, Inc.), 206 Bankr. 1010 (Bankr. N.D. Ga. 1997); Gerschick v. Pounds, 262 Ga. App. 554, 586 S.E.2d 22 (2003).

RESEARCH REFERENCES

ALR. — Right of tort-feasor to contribution from joint tort-feasor who is spouse or otherwise in close familial relationship to injured party, 25 ALR4th 1120.

Release of one joint tortfeasor as discharging liability of others under Uniform Contribution Among Tortfeasors Act and other statutes expressly governing effect of release, 6 ALR5th 883.

23-2-76. Equitable setoff.

Law reviews. — For survey article citing developments in Georgia trial practice and procedure from mid-1980 through mid-1981, see 33 Mercer L. Rev. 275 (1981).

JUDICIAL DECISIONS

Setoff as not defeating plaintiff's claim, regardless of legal or equitable nature of setoff. — Existence of valid right of setoff does not operate to defeat plaintiff's claim, although it might preclude his recovery of any actual damages; and this is true regardless of the assertion of the setoff as a legal right or an equitable right. National City Bank v. Busbin, 175 Ga. App. 103, 332 S.E.2d 678 (1985); Gynecologic Oncology v. Weiser, 212 Ga. App. 858, 443 S.E.2d 526 (1994).

Setoff improper. — Trial court erred in ruling for a development company in the company's declaratory judgment action seeking to have the company's debt to a bank set off against the company's loan to a holding company because the bank and the holding company were separate entities; the development company knew the risks involved when the company made the holding company loan, and the bank could not obtain relief unavailable to any other entities who lent money to the holding company simply because the company borrowed money from the bank years ago. Bank of the Ozarks v. DKK Dev. Co., 315 Ga. App. 539, 726 S.E.2d 608 (2012).

Voluntary rent provision and debt payment. — Defendant's claim that she satisfied her debt on a promissory note owed to her spouse by providing her mother-in-law with a rent-free apartment and by paying certain debts that spouse owed to certain creditors was to no avail as it was done under a mere volunteer arrangement with no outstanding obligations to do so. United States v. Speir, 808 F. Supp. 829 (S.D. Ga. 1992).

The right to setoff may be waived. — See Solid Waste Mgmt. Auth. v. Transwaste Servs., 247 Ga. App. 29, 543 S.E.2d 98 (2000).

Cited in Glen Oak, Inc. v. Henderson, 258 Ga. 455, 369 S.E.2d 736 (1988); Kruse v. Todd, 260 Ga. 63, 389 S.E.2d 488 (1990).

ARTICLE 5

ADMINISTRATION OF ASSETS GENERALLY

23-2-91. When equity will interfere with administration of estates.

Law reviews. — For survey article on wills, trusts, and administration of estates, see 34 Mercer L. Rev. 323 (1982). For annual survey of wills, trusts, guardianships, and fiduciary administration, see 58 Mercer L. Rev. 423 (2006). For survey article on wills, trusts, guardianships, and fiduciary administration, see 59 Mercer L. Rev. 447 (2007).

JUDICIAL DECISIONS

ANALYSIS

General Consideration

When remedies at law inadequate equity jurisdiction exercisable.

Trial court's denial of a petition brought by heirs of a decedent's estate seeking partition and sale of estate property by a special master was affirmed where the trial court found that the interests of the heirs were adequately protected in the probate court so that the intervention of equity was not warranted; the heirs failed to meet their obligation of demonstrating a strong reason for the intervention of equity into the administration of the estate. Dawson v. Dawson, 277 Ga. 850, 597 S.E.2d 114 (2004).

Cited in Moore v. Lindsey, 662 F.2d 354 (5th Cir. 1981); Powell v. Thorsen, 248 Ga. 697, 285 S.E.2d 699 (1982); Taylor v. Mosley, 252 Ga. 325, 314 S.E.2d 184 (1984); Jenkins v. Finch, 257 Ga. 276, 357 S.E.2d 587 (1987); Getman v. Ackerly, 259 Ga. 534, 384 S.E.2d 651 (1989); Brown v. Cronic, 266 Ga. 779, 470 S.E.2d 682 (1996); Levenson v. Word, 286 Ga. 114, 686 S.E.2d 236 (2009).

Danger of Loss or Other Injury

Standing. — Under O.C.G.A. § 23-2-91(2), two children, as heirs at law, had a right to petition the trial court for an interlocutory injunction to protect potential assets of the estate pending the outcome of the children's case against an executrix challenging an alleged gift made by the decedent hours before death since the trial court could be involved in matters relating to the administration of a decedent's estate if equitable interference was required for the complete protection of parties' rights; "interest in the estate" included equitable redress in the trial court when adequate relief was otherwise unavailable. Johns v. Morgan, 281 Ga. 51, 635 S.E.2d 753 (2006).

"Interest in the estate." — Under O.C.G.A. § 23-2-91(2), heirs at law, although not beneficiaries under a purported will, have a statutory "interest in the estate" to allow them standing to petition the superior court for equitable relief; "interest in the estate" in O.C.G.A. § 23-2-91(2), includes equitable redress in the superior court when adequate relief is otherwise unavailable. Johns v. Morgan, 281 Ga. 51, 635 S.E.2d 753 (2006).

23-2-92. Application for direction or construction of will.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

23-2-96. When equitable assets may be reached by creditor.

Law reviews. — For article, "Retirement Benefits: Protection from Creditors' Claims," see 24 Ga. St. B.J. 118 (1988).

For comment "The Georgia Supreme Court's Creation of an Equitable Interest in Marital Property — Yours? Mine? Ours!," 34 Mercer L. Rev. 449 (1982).

23-2-97. Time limit for intervention in case disposing of assets; publication of order.

JUDICIAL DECISIONS

Constitutionality. — This section, insofar as it purports to allow termination of claims after service by publication on known claimants whose whereabouts are known and who are present within the state, violates due process. Suttles v. J.B. Withers Cigar Co., 194 Ga. 617, 22 S.E.2d 129 (1942); to the extent that it holds to the contrary, is hereby overruled. Johnson v. Mayor of Carrollton, 249 Ga. 173, 288 S.E.2d 565 (1982).

ARTICLE 6

EXERCISE OF POWERS OF APPOINTMENT AND SALE

23-2-111. Exercise of discretionary powers not compellable generally.

JUDICIAL DECISIONS

Bankruptcy court could not compel a trustee under a will to exercise power of appointment which gave her total discretion as to the payment of trust corpus or income to the testator's descendants, one of whom was the debtor. Arney v. Hicks, 22 Bankr. 243 (Bankr. N.D. Ga. 1982).

23-2-114. Powers of sale — To be construed strictly; manner of sale; who may exercise.

Cross references. — Ambiguous terms and rules of construction of instruments, § 11-3-118. Operation of "open-end" clauses in real estate mortgages and deeds to secure debt, § 44-14-1.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

Duty of mortgagee to exercise fairly and in good faith power of sale. — There exists a statutory duty upon a mortgagee to exercise fairly and in good faith the power of sale in a deed to secure debt. Although arising from a contractual right, breach of this duty is a tort compensable at law. Clark v. West, 196 Ga. App. 456, 395 S.E.2d 884 (1990).

Wrongful foreclosure action recognized. — Trial court erred by directing verdict in favor of plaintiff on defendants' wrongful foreclosure claim, as Georgia recognized such a claim and even allowed for damages for mental anguish, despite no evidence indicating that wrongful foreclosure interfered with any attempted sale of the property. DeGolyer v. Green Tree Servicing, LLC, 291 Ga. App. 444, 662 S.E.2d 141 (2008).

Wrongful foreclosure claim sufficiently pled. — Trial court erred by dismissing the mortgagors' complaint for wrongful foreclosure because, construed in the light most favorable to the mortgagors, the complaint sufficiently alleged that the bank owed obligations to the mortgagors under the security deed and that the bank breached those contractual obligations by going forward with the foreclosure sale despite the error in the published foreclosure advertisements. Racette v. Bank of Am., N.A., 318 Ga. App. 171, 733 S.E.2d 457 (2012).

Putative successor in interest was not entitled to summary judgment on the debtor's wrongful foreclosure claim because the debtor pointed to evidence from which a reasonable jury could have concluded that the successor's conduct at the foreclosure sale, which included abruptly deciding to sell the personal property separately and offering a bid of $25,000 for property the successor believed was worth substantially more, chilled the bidding. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, No. 1:12-CV-2545-AT, 2014 U.S. Dist. LEXIS 56199 (N.D. Ga. Mar. 31, 2014).

There was a genuine issue of material fact as to whether the defendant's wrongful exercise of the power of sale was a breach of the duty of good faith owed to the debtor and there was also a genuine issue as to whether the debtor had suffered damages as a result of the foreclosure sale. McDaniel v. SunTrust Bank (In re McDaniel), 523 B.R. 895 (Bankr. M.D. Ga. 2014).

Wrongful foreclosure claim defeated. — Plaintiff's claim for wrongful exercise of a power of sale under O.C.G.A. § 23-2-114 was defeated by the plaintiff's default on the plaintiff's loan obligations and failure to cure the default before foreclosure. Thus, the plaintiff could not show causation because any alleged injury was solely attributable to the plaintiff's own actions. Howard v. Mortg. Elec. Registration Sys., No. 1:10-cv-1630-WSD, 2012 U.S. Dist. LEXIS 116366 (N.D. Ga. Aug. 17, 2012).

Law firm was not a proper party to a claim for wrongful foreclosure when the plaintiff alleged only that the firm acted as counsel in the foreclosure. Thompson-El v. Bank of Am., N.A., 327 Ga. App. 309, 759 S.E.2d 49 (2014).

HUD regulations clearly referenced in a deed as conditions precedent to the power to accelerate and the power of sale could form the basis of a breach of contract action; the homeowner asserted a duty that the bank owed the homeowner, and the homeowner's claim was not barred by the preexisting duty rule. Bates v. JPMorgan Chase Bank, NA, 768 F.3d 1126 (11th Cir. 2014).

Cited in Hilton v. Millhaven Co., 158 Ga. App. 862, 282 S.E.2d 415 (1981); Cummings v. Anderson, 173 Bankr. 959 (Bankr. N.D. Ga. 1994); Green Rivers Forest, Inc. v. Aetna Life Ins. Co., 200 Bankr. 956 (Bankr. M.D. Ga. 1996); Aikens v. Wagner, 231 Ga. App. 178, 498 S.E.2d 766 (1998); Atlanta Dwellings, Inc. v. Wright, 272 Ga. 231, 527 S.E.2d 854 (2000).

Strict Construction

Individual debt of one of parties executing security deed. — See Americus Fin. Co. v. Wilson, 189 Ga. 635, 7 S.E.2d 259 (1940); Bank of LaFayette v. Giles, 208 Ga. 674, 69 S.E.2d 78 (1952); Cordele Banking Co. v. Powers, 217 Ga. 616, 124 S.E.2d 275 (1962); Hill v. Perkins, 218 Ga. 354, 127 S.E.2d 909 (1962).

Exercise of Power by Assignee

Formal assignment of deed effectively transfers power of sale contained in deed.

Under O.C.G.A. §§ 23-2-114 and 44-14-64(b), the assignments of plaintiff homeowner's security deed granted to the defendant bank did not diminish the deed's powers in the bank's foreclosure

Exercise of Power by Assignee (Cont'd)

action; thus, the homeowner's wrongful foreclosure claim failed to state a claim for relief. Milani v. OneWest Bank FSB, No. 11-15378, 2012 U.S. App. LEXIS 21559 (11th Cir. Oct. 17, 2012) (Unpublished).

Assignment of security deed did not prohibit foreclosure sale. — Lender's assignment of a security deed through a custodial agreement that did not prohibit the "Custodian/Trustee" bank from exercising a power of sale authorized the bank to conduct the foreclosure sale. Lynn v. US Bank Nat'l Ass'n, No. 12-11015, 2013 U.S. App. LEXIS 20142 (11th Cir. Oct. 2, 2013) (Unpublished).

District court properly dismissed the plaintiff's suit against multiple financial institutions and fictitious parties seeking declaratory and equitable relief to stop foreclosure proceedings as there was no dispute that the holder of the security deed at the time of the proposed foreclosure had the authority to foreclose on the property in accordance with the security deed's power of sale. Assignment of the security deed did not diminish the instrument's powers under Georgia law. Stabb v. GMAC Mortg., LLC, No. 13-15900, 2014 U.S. App. LEXIS 16081 (11th Cir. Aug. 21, 2014) (Unpublished).

Standing to foreclose. — Nominee of a lender had standing to foreclose on the plaintiff's property since a note and the security deed clearly provided that the note could be sold and that the nominee would remain the assignee of any subsequent note holder. The plain language of the security deed unequivocally granted to the nominee the right to foreclose and sell the property in the event of the plaintiff's default. Howard v. Mortg. Elec. Registration Sys., No. 1:10-cv-1630-WSD, 2012 U.S. Dist. LEXIS 116366 (N.D. Ga. Aug. 17, 2012).

Proof of mailing sufficient. — Trial court did not err in granting summary judgment in favor of the mortgagee in a wrongful foreclosure action because the mortgagee submitted evidence that the mortgagee's attorney mailed written notice of the initiation of foreclosure proceedings on the mortgagor by certified mail and by regular mail to the property address and to the mortgagor's post office box and, although there is no evidence that the mortgagor received any of the notices, the evidence of the proof of mailing was sufficient. Thompson-El v. Bank of Am., N.A., 327 Ga. App. 309, 759 S.E.2d 49 (2014).

Manner of Sale Generally

1. In General

A power of sale in a security deed, etc.

Finding that the lender's conduct constituted an unfair exercise of the power of sale could be based on evidence that the lender: kept information as to the balance due on the debt from the person responsible therefor, knowing that that person would pay the debt; failed to give proper notice of the time and place of the sale; took personal property from the house after the sale; and bought the property for less than one-fifth of the amount he sold it for shortly after the sale. Brown v. Freedman, 222 Ga. App. 213, 474 S.E.2d 73 (1996).

Damages for wrongful foreclosure. — Measure of damages for wrongful foreclosure was the fair market value of the property foreclosed rather than the full bid price at a foreclosure sale to an agent of the grantee, in light of the grantee's subsequent sale of the property to a good faith purchaser which prevented the grantors from redeeming their equity. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992).

Tort action for wrongful foreclosure. — Where mortgagor did not seek to have foreclosure set aside, but chose to pursue an action in tort "for damages for wrongful foreclosure", mortgagor was not entitled to recover both the property itself and the value of her equity. Calhoun First Nat'l Bank v. Dickens, 264 Ga. 285, 443 S.E.2d 837 (1994).

Fraud was not required as the basis for a wrongful foreclosure action against a materials supplier who had no right to foreclose on the property under improperly recorded security deeds. Sears Mtg. Corp. v. Leeds Bldg. Prods., Inc., 219 Ga.

App. 349, 464 S.E.2d 907 (1995), aff'd in part and rev'd in part, 267 Ga. 300, 477 S.E.2d 565 (1996).

It was not necessary that a foreclosure be completed to bring an action for wrongful foreclosure. Sears Mtg. Corp. v. Leeds Bldg. Prods., Inc., 219 Ga. App. 349, 464 S.E.2d 907 (1995), aff'd in part and rev'd in part, 267 Ga. 300, 477 S.E.2d 565 (1996).

Trial court erred in dismissing a pro se borrower's complaint for wrongful foreclosure and breach of contract against the borrower's lender's alleged assignee; the trial court could not consider documents attached to the motion to dismiss, and the complaint adequately alleged failure to give the borrower notice and improper advertising, contrary to O.C.G.A. §§ 44-14-162.2 and 44-14-162(a). Babalola v. HSBC Bank, USA, N.A., 324 Ga. App. 750, 751 S.E.2d 545 (2013).

Borrower in default can maintain wrongful foreclosure action. — Borrower could maintain wrongful foreclosure action, despite being in default on the underlying loan, because the borrower alleged damages were not solely attributable to the borrower's default. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, No. 1:12-CV-2545-AT, 2013 U.S. Dist. LEXIS 187236 (N.D. Ga. Feb. 13, 2013).

Sale not void merely because made on legal holiday. — A sale of property in this state under the power of sale contained in a deed to secure debt is not void because the sale is had on a legal holiday. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Payment of surplus received from sale. — Grantee of deeds to secure debt had to pay to grantors the surplus from a foreclosure sale of two properties to the grantee's agent and a subsequent transfer of the properties to third parties for profit. Tower Fin. Servs., Inc. v. Smith, 204 Ga. App. 910, 423 S.E.2d 257, cert. denied, 204 Ga. App. 922, 423 S.E.2d 257 (1992).

2. Mortgage

Mortgagee may purchase mortgaged property at sale by him under power of sale in the mortgage, if by the terms of the mortgage he is expressly authorized to do so. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Foreclosure notice as published was not confusing because it narrowly defined what would be excluded from the sale as funds, and the notice clearly stated what would be sold as realty included anything defined as realty under Georgia law; thus, the notice's publication could not be the basis for the wrongful foreclosure claim. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, No. 1:12-CV-2545-AT, 2013 U.S. Dist. LEXIS 187236 (N.D. Ga. Feb. 13, 2013).

In absence of specific provision, holder of mortgage with power of sale is not required to give notice of the exercise of the power to a subsequent purchaser or incumbrancer; and the validity of the sale is not affected by the fact that such notice is not given. Miller Grading Contractors v. Georgia Fed. Sav. & Loan Ass'n, 247 Ga. 730, 279 S.E.2d 442 (1981).

Bank has power to change terms of mortgage. — Bank was the entity with full authority to negotiate, amend, or modify the terms of the plaintiffs' mortgage, and nothing in the statute shall be construed to require the bank, as servicer for the loan servicer, to do so. Fenello v. Bank of Am., N.A., No. 1:11-cv-4139-WSD, 2013 U.S. Dist. LEXIS 20631 (N.D. Ga. Feb. 15, 2013).

3. Adequate Price Required

Causation between conduct and inadequate price. — In a wrongful foreclosure action, the borrower failed to allege a causal connection between defendants' alleged conduct and the grossly inadequate sales price at foreclosure; the borrower had not alleged that other parties were present and ready to bid or that such parties relied on the lender's winning bid. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, No. 1:12-CV-2545-AT, 2013 U.S. Dist. LEXIS 187236 (N.D. Ga. Feb. 13, 2013).

Circumstances of auction. — Plaintiffs' complaint alleged facts that, if true, supported a cause of action by debtor for wrongful foreclosure. In particular, plaintiffs alleged that defendant did not sell the

Manner of Sale Generally (Cont'd)
3. Adequate Price Required (Cont'd)

leasehold to the "highest bidder" and violated the contractual duty imposed by paragraph 19 of the security deed by re-auctioning the property and selling the leasehold for a price that was $900,000 less than the sale price of the first auction; additionally, plaintiffs alleged that the circumstances of the auction, such as changing the terms of the sale after accepting a bid of 3.9 million dollars, contributed to the resulting lower price that was accepted by defendant. Colony Bank Worth v. 150 Beachview Holdings, LLC (In re Fry), No. 03-20394, 2007 Bankr. LEXIS 4743 (Bankr. S.D. Ga. Mar. 23, 2007).

ARTICLE 7

NONPERFORMANCE OF CONTRACT

23-2-130. When specific performance decreed generally.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PROOF OF CONTRACT

General Consideration

Inadequacy of relief at law essential to equitable relief.

Monetary damages were not an adequate remedy at law for a county in the county's suit against a contractor seeking specific performance of an agreement to donate to the county a completed wastewater treatment facility for which the county had paid. Moreover, the county was not required to use the county's powers of eminent domain as if the contract had never existed. Forsyth County v. Waterscape Servs., LLC, 303 Ga. App. 623, 694 S.E.2d 102 (2010).

Settlement agreement. — An order of specific performance as to a merely private debt in the form of an unincorporated settlement agreement in a divorce proceeding cannot be deemed to be a more adequate remedy than an action at law for breach of contract damages, since that order cannot constitutionally be enforced by contempt and would not obviate the necessity of the obligee's resort to successive lawsuits for the obligor's future breaches. Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914 (1993).

Specific performance of real estate contract. — Property owners were entitled to specific performance under O.C.G.A. § 23-2-130 of a settlement agreement by which a seller agreed to re-purchase their property for $1 million. The agreement was not procured by duress because the seller was owned by a sophisticated business person who consulted legal counsel. Hampton Island, LLC v. HAOP, LLC, 306 Ga. App. 542, 702 S.E.2d 770 (2010).

New provision regarding reasonableness not applicable. — Based on the date of a defaulted note, which was not superseded or cancelled by the parties' loan modification agreement, the former version of the statute that provided for the lender's attorney's fees controlled, such that a reasonableness determination under the newer version of the statute was not appropriate. Jones v. Bank of Am., N.A., No. 13-12292, 2014 U.S. App. LEXIS 7827 (11th Cir. Apr. 25, 2014) (Unpublished).

Cited in Sims v. Holtzclaw, 259 Ga. 537, 384 S.E.2d 656 (1989); Quadron Software Int'l Corp. v. Plotseneder, 256 Ga. App. 284, 568 S.E.2d 178 (2002).

Proof of Contract

Requirement of certainty.

Because a handwritten loan agreement did not sufficiently describe the land to be conveyed in the event of a default, and

because the lender had an adequate remedy at law in the form of a monetary judgment, the trial court did not err in refusing to grant specific performance. Kirkley v. Jones, 250 Ga. App. 113, 550 S.E.2d 686 (2001).

A document that was simply a purchase offer lacked the elements needed to create a binding and enforceable contract, and neither specific performance nor damages were obtainable based on it. Lee v. Green Land Co., 245 Ga. App. 558, 538 S.E.2d 189 (2000).

RESEARCH REFERENCES

Am. Jur. Pleading and Practice Forms. — 22B Am. Jur. Pleading and Practice Forms, Specific Performance, § 3.

ALR. — Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 ALR4th 891.

23-2-131. When specific performance of parol contract for land decreed; sufficient part performance.

Law reviews. — For survey article on real property, see 34 Mercer L. Rev. 255 (1982).

JUDICIAL DECISIONS

Construction with O.C.G.A. § 53-4-30. — More specific provisions of O.C.G.A. § 53-4-30 addressing contracts to make a will control over the more general provisions of O.C.G.A. §§ 23-2-131 and 23-2-132 addressing any parol contract as to land and any voluntary agreement or merely gratuitous contract to land, respectively; thus, the equitable relief of specific performance is not available as a means of enforcing an oral will contract. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Partial payment and possession. — While payment of a part of the purchase-money is not alone such part performance as will take the case out of the statute of frauds, partial payment of the purchase-money accompanied with possession will amount to such part performance as to take the contract out of the statute and to authorize the specific performance of a parol contract. Smith v. Cox, 247 Ga. 563, 277 S.E.2d 512 (1981).

Payment in full on oral contract for sale of land. — In a suit for specific performance brought by a plaintiff seeking to enforce an alleged oral contract to sell real property, the trial court erred in granting summary judgment to the defendant based on the Statute of Frauds preventing recovery to the plaintiff; the plaintiff had presented evidence establishing the existence of an oral contract for the sale of the property and that it was excepted from the Statute of Frauds based on the plaintiff's performance of paying for the property in full, and thus, issues of fact remained as to whether defendant's decedent had accepted performance through payments received by a sibling and whether, in light of the plaintiff's previous tenancy, the plaintiff's performance was inconsistent with the lack of a contract to sell the property. Edwards v. Sewell, 289 Ga. App. 128, 656 S.E.2d 246 (2008).

Possession with valuable improvements. — When a party seeking specific performance of an oral contract to sell realty relies on the principle of possession with improvements, it must be shown that the possession and improvement arose by virtue of and in the faith of the oral contract or promise, so as to take the case out of the statute of frauds and constitute

the equivalent of a writing by showing acts unequivocally referring to the alleged contract or promise; thus, where a party takes possession under an oral contract to rent, and also alleged an oral option to purchase, the possession is under the tenancy and cannot also be shown to be in reliance on the option. Smith v. Cox, 247 Ga. 563, 277 S.E.2d 512 (1981).

Proof of possession in reliance on the oral option to purchase is required of a party claiming specific performance of an alleged option agreement under subsection (b). Engram v. Engram, 265 Ga. 804, 463 S.E.2d 12 (1995).

Creation of parol license to use land did not interfere with existing right of first refusal. — In a suit brought by a property owner seeking to specifically perform an oral agreement to purchase a strip of real estate, the trial court properly denied the property owner's request for an interlocutory judgment based on a violation of the statute of frauds and because another held a first right of refusal over the sale/purchase of the property. However, the trial court erred by concluding that the property owner had not obtained a parol license to use the strip since the property owner had made expenditures to improve the land and, as to the right of first refusal held by another, the grant of a parol license was not the equivalent to a sale of the property to have in anyway interfered with that right. Meinhardt v. Christianson, 289 Ga. App. 238, 656 S.E.2d 568 (2008).

Sufficiency of complaint. — Plaintiff's complaint alleging that she entered into a parol agreement with her husband to dissolve the marriage, divide the marital estate, and arrange for child support, that she possessed the property and paid the mortgage pursuant to the agreement, and that she maintained and improved the property, stated a claim under this section. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

Specific performance warranted. — Plaintiff's possession and partial payment, as well as plaintiff's possession with valuable improvements, and the payment of tax and mortgage arrears satisfied the requirements for an order of specific performance of an oral contract for the sale of land. Dobbs v. Dobbs, 270 Ga. 887, 515 S.E.2d 384 (1999).

Under an oral agreement, the only performance which plaintiff had yet to complete was his payment of the remaining portion of the agreed purchase price and that payment was not due until closing; therefore, the trial court properly granted summary judgment on plaintiff's claim for specific performance. Braddy v. Boynton, 271 Ga. 55, 515 S.E.2d 394 (1999).

Because a contractor's performance and an owner's acceptance of that performance satisfied the requirements of the statute of frauds, O.C.G.A. § 13-5-31, and the plats and deeds established the requisite description of the properties to be exchanged, the contractor was entitled to specific performance under O.C.G.A. § 23-2-131(a). Masters v. Redwine, 279 Ga. 432, 615 S.E.2d 118 (2005).

Superior court did not err in granting a purchaser summary judgment in the purchaser's action seeking specific performance pursuant to O.C.G.A. § 23-2-131 and requiring a mortgage company to deliver a deed conveying certain property because the company failed to demonstrate any merit in the company's contention that the superior court improperly refused to invoke the court's equitable power to relieve the company from performing under the foreclosure sale contract on the ground that the opening bid the company set forth was a mistake. Because the dollar amount of the high bid at the foreclosure sale alone made it immediately apparent that there had been a mistake, a reasonable inference arose that had reasonable diligence been employed before the foreclosure sale, the alleged unilateral mistake would not have occurred. Decision One Mortg. Co., LLC v. Victor Warren Props., Inc., 304 Ga. App. 423, 696 S.E.2d 145 (2010).

Specific performance not warranted. — Specific performance of a low-cost lease of property was not merited because plaintiff had been paid back for the investment in commencing a landfill on the property and did not argue that an award of money damages was not sufficient. Elliott v. McDaniel, 224 Ga. App. 848, 483 S.E.2d 104 (1997), rev'd on other grounds, 269 Ga. 262, 497 S.E.2d 786 (1998).

Where the defendant simply made a bid for the property at a nonjudicial foreclosure sale, which was accepted by the seller, no partial performance of the contract occurred and the transaction, therefore, stayed within the confines of the statute of frauds. James v. Safari Enters., Inc., 244 Ga. App. 813, 537 S.E.2d 103 (2000).

The trial court did not err in directing a verdict against a counterclaim to enforce an oral agreement between the parties to reconvey property to the defendant, notwithstanding proof of part performance by the defendant consisting of the defendant's continued possession after conveying the property plus making monthly payments to the plaintiff of approximately $450, since, although this was consistent with the existence of an oral agreement to convey the property back to the defendant after a loan was paid off, it was also consistent with the lack of such an agreement, since monthly payments approximating rent did not establish part performance of the alleged oral agreement to reconvey the property to the defendant. Rose v. Cain, 247 Ga. App. 481, 544 S.E.2d 453 (2001).

When a party who leased certain land from its supposed owner, who could not read, attempted to enforce an option to purchase the land, which was included in documents the lessee gave the owner to sign, the lessee's partial payment, possession of, and improvements to the land did not entitle the lessee to enforce the contract under O.C.G.A. § 23-2-131(a) because the lessee was not trying to enforce an oral contract, to which the statute referred, and the lessee's possession and payment arose by virtue of the lease provision of the parties' agreement, rather than any option to purchase. Makowski v. Waldrop, 262 Ga. App. 130, 584 S.E.2d 714 (2003).

A trial court erred in finding that a lease-purchase agreement was enforceable because, though it satisfied the statute of frauds, it was invalid for failure of consideration in that the lessee/proposed purchaser never paid the rent owed nor any of the property taxes, which not only invalidated the agreement but voided the purchase option under O.C.G.A. § 13-1-8(a). Further, the trial court erred in holding that the lessee/proposed purchaser was entitled to specific performance of the agreement based on repairs made since there was no legal authority to support the trial court's proposition that part performance of an otherwise unenforceable written agreement, as modified by subsequent oral agreements between the parties, transformed it into an enforceable parol contract. Estate of Ryan v. Shuman, 288 Ga. App. 868, 655 S.E.2d 644 (2007), cert. denied, No. S08C0664, 2008 Ga. LEXIS 482 (Ga. 2008).

Decedent's son, grandson, and friend were not entitled to specific performance of a will contract because they could not meet the requirements of O.C.G.A. §§ 23-2-131 and 23-2-132; appellants failed to show that the appellants had possession of the decedent's property and that the appellants made valuable improvements thereto simply by virtue of the decedent's promise to use the decedent's will to leave the appellants a life estate. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Conflicting theories about land ownership was jury matter. — Trial court properly allowed argument and a jury instruction on O.C.G.A. § 53-4-30 as the parties agreed that an individual's former father-in-law promised to convey certain property to the individual and his ex-wife, upon the father-in-law's death; the jury could resolve any conflicting theories as to the ownership of the land and the applicability of O.C.G.A. §§ 23-2-131(a) and 23-2-132. Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

Cited in Shivers v. Webster, 224 Ga. App. 254, 480 S.E.2d 304 (1997); Pettigrew v. Collins, 246 Ga. App. 207, 539 S.E.2d 214 (2000).

RESEARCH REFERENCES

ALR. — Special or consequential damages recoverable, on account of delay in delivering possession, by purchaser of real property awarded specific performance, 11 ALR4th 891.

23-2-132. When voluntary agreement enforced.

JUDICIAL DECISIONS

Analysis

General Consideration

Construction with O.C.G.A. § 53-4-30. — More specific provisions of O.C.G.A. § 53-4-30 addressing contracts to make a will control over the more general provisions of O.C.G.A. §§ 23-2-131 and 23-2-132 addressing any parol contract as to land and any voluntary agreement or merely gratuitous contract to land, respectively; thus, the equitable relief of specific performance is not available as a means of enforcing an oral will contract. Newton v. Lawson, 313 Ga. App. 29, 720 S.E.2d 353 (2011).

Oral gift of land becomes complete and irrevocable, etc.

In accord with Sharpton v. Givens. See Sharp v. Sumner, 272 Ga. 338, 528 S.E.2d 791 (2000).

Sufficiency of complaint. — Plaintiff's complaint alleging that she entered into a parol agreement with her husband to dissolve the marriage, divide the marital estate, and arrange for child support, that she possessed the property and paid the mortgage pursuant to the agreement, and that she maintained and improved the property, stated a claim under this section. Coleman v. Coleman, 265 Ga. 568, 459 S.E.2d 166 (1995).

Cited in Gillis v. Buchheit, 232 Ga. App. 126, 500 S.E.2d 38 (1998).

Proof Generally

Conflicting theories about land ownership was jury matter. — Trial court properly allowed argument and a jury instruction on O.C.G.A. § 53-4-30 as the parties agreed that an individual's former father-in-law promised to convey certain property to the individual and his ex-wife, upon the father-in-law's death; the jury could resolve any conflicting theories as to the ownership of the land and the applicability of O.C.G.A. §§ 23-2-131(a) and 23-2-132. Jackson v. Neese, 276 Ga. App. 724, 624 S.E.2d 139 (2005).

Sufficient proof established gift of land. — Although there was no purchase money resulting trust created under former O.C.G.A. §§ 53-12-90, 53-12-91, and 53-12-92 (see O.C.G.A. §§ 53-12-2, 53-12-130, and 53-12-131), a decedent's mother was entitled to an equity interest in property of the deceased daughter because a constructive trust was established under former O.C.G.A. § 53-12-93(a) (see O.C.G.A. § 53-12-132) and there was evidence of a gift of land under O.C.G.A. § 23-2-132, as an exception to the statute of frauds, in that the mother lived on the property, made valuable improvements, and paid meritorious consideration. Oliver v. 4708 Old Highgate Entry, No. 1:07-cv-2117-ODE, 2009 U.S. Dist. LEXIS 73002 (N.D. Ga. Apr. 21, 2009).

Meritorious Consideration

Labor, expenditures, love and affection. — Wife's provision of labor, expenditures and natural love and affection amounted to meritorious consideration for a valid oral gift of a one half undivided interest in husband's property. United States v. 1419 Mount Alto Rd., 830 F. Supp. 1476 (N.D. Ga. 1993).

23-2-133. Inadequacy of price; unfair or unjust contracts.

JUDICIAL DECISIONS

ANALYSIS

General Consideration

Cited in Kelly v. Vargo, 261 Ga. 422, 405 S.E.2d 36 (1991); Owenby v. Holley, 256 Ga. App. 13, 567 S.E.2d 351 (2002).

Inadequacy of Price Generally

Shareholders failed to rebut corporations showing price offered for shares was fair. — Corporation was properly granted specific performance of a shareholder agreement requiring the corporation's former employees to sell back their shares at the price the corporation offered as the corporation submitted an affidavit calculating the corporation's "going concern" value—the formula for determining share value set out in the shareholder agreement—and the employees offered no evidence countering the affidavit. Furthermore, since there were no allegations that there was anything unfair, unjust, or violative of the conscience about the agreement, the shareholders' equitable defenses were inapplicable to the corporation's claim for specific performance of the agreement. Clawson v. Intercat, Inc., 294 Ga. App. 624, 669 S.E.2d 671 (2008), cert. denied, No. S09C0462, 2009 Ga. LEXIS 199 (Ga. 2009).

Determination of Fairness

Summary judgment inappropriate when fairness and value issues remain. — Trial court erred in granting summary judgment to the option holder on the holder's specific performance claim against the option grantors; issues of fairness and value remained regarding the option contract, thus precluding summary judgment. Henry v. Blankenship, 275 Ga. App. 658, 621 S.E.2d 601 (2005).

Court will not decree specific performance when contract terms unclear. — A court of equity will not decree specific performance of a contract for the sale of land, where it is not clear that the terms of the contract were agreed upon and understood. Beller & Gould v. Lisenby, 248 Ga. 353, 283 S.E.2d 237 (1981).

23-2-134. Vendor's ability to comply.

JUDICIAL DECISIONS

ANALYSIS

Specific Performance and Damages

Tender of purchase price. — In an action filed by a trust and its trustee against a school board alleging the breach of a real estate contract, or in the alternative, specific performance of the contract at a reduced purchase price, summary judgment in favor of the school board was reversed on the breach of contract claim; however, summary judgment on the specific performance claim was affirmed, as the trust failed to tender the full purchase price, which was a prerequisite to a specific performance demand, the trust was not excused from doing so, and a tender would not have been futile. Peaches Land Trust v. Lumpkin County Sch. Bd., 286 Ga. App. 103, 648 S.E.2d 464 (2007).

23-2-135. Damages when specific performance impossible.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Award of specific performance does not, as a matter of law, bar recovering attorney fees or punitive damages. Clayton v. Deverell, 257 Ga. 653, 362 S.E.2d 364 (1987).

Cited in Kirkley v. Jones, 250 Ga. App. 113, 550 S.E.2d 686 (2001).

CHAPTER 3

EQUITABLE REMEDIES AND PROCEEDINGS GENERALLY

Article 3

Quia Timet

PART 1

CONVENTIONAL QUIA TIMET

Sec.
23-3-43. Special master.
23-3-44. Redemption and notice.

PART 2

QUIA TIMET AGAINST ALL THE WORLD

23-3-73. Enforcement of article.

Article 6

Taxpayer Protection Against False Claims

23-3-120. Definitions.
23-3-121. Submission of false information; liability; no application to taxation.
23-3-122. Investigations by Attorney General; civil actions authorized; intervention by government; limitation on participating in litigation; stay of discovery; alternative remedies; division of recovery; limitations.
23-3-123. Statute of limitations; service of subpoena; limitation on disclosures; intervention; preponderance of the evidence standard; effect of criminal conviction on civil actions.
23-3-124. Venue.
23-3-125. Civil investigative demands.
23-3-126. Remedies nonexclusive; construction of provisions.
23-3-127. Proceedings involving Medicaid.

ARTICLE 1

GENERAL PROVISIONS

23-3-1. Legal and equitable rights given effect; legal and equitable remedies applied.

JUDICIAL DECISIONS

Cited in Hudson v. Hudson, 258 Ga. 692, 373 S.E.2d 372 (1988).

RESEARCH REFERENCES

ALR. — Punitive damages: power of equity court to award, 58 ALR4th 844.

23-3-3. Ancillary extraordinary remedies.

Law reviews. — For survey article on wills, trusts, guardianships, and fiduciary administration, see 60 Mercer L. Rev. 417 (2008).

ARTICLE 2

NE EXEAT

23-3-24. Disposition of property.

JUDICIAL DECISIONS

Cited in Williams v. Dienes Apparatus, Inc., 200 Ga. App. 205, 407 S.E.2d 408 (1991).

ARTICLE 3

QUIA TIMET

Part 1

Conventional Quia Timet

JUDICIAL DECISIONS

Cited in Vaughan v. Vaughan, 253 Ga. 76, 317 S.E.2d 201 (1984).

23-3-40. Purpose of quia timet.

Law reviews. — For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006).

JUDICIAL DECISIONS

No right to jury trial. — Special master did not err by denying a property owner a right to a jury trial in a buyer's quiet title action as the action was brought under the conventional quia timet statute and the owner had no right to a jury trial. Davis v. Harpagon Co., LLC, 281 Ga. 250, 637 S.E.2d 1 (2006).

Delinquent taxpayer had no right to a jury trial in a transferee's action to remove any clouds as to the title on the delinquent taxpayer's property, pursuant to O.C.G.A. § 23-3-40, to which the transferee obtained title to by the order of a special master. Human v. Harpagon Co., LLC, 281 Ga. 372, 637 S.E.2d 684 (2006).

When one seeks conventional quia timet, one is not entitled to trial by jury under O.C.G.A. § 23-3-43; when one seeks quia timet against all the world, however, one is entitled by the provisions of O.C.G.A. § 23-3-66 to a jury trial, but there is no right to a jury trial when a suit at law is converted by amendment into an equitable proceeding. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

Trial court properly appointed a special master in a quiet title action and a corporation, who was unsuccessful in the corporation's claim for the property, was properly held not entitled to a jury trial because the suing bank had amended the bank's petition to provide for an action only for conventional quia timet by the time the petition was heard by the special master; therefore, no jury trial was available under O.C.G.A. § 23-3-43. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

Quiet title action from tax sale. — Because a tax sale listed the wrong owner of the property to be sold and the description of the property was inconsistent, such that it was unclear which property was being sold, the bidder's deed was defective, as was the quitclaim deed of the purchaser of the property from the bidder, and accordingly, there was no merit to the purchaser's claim that it was due summary judgment on the issue of whether the owner's executrix had a right to redeem the property or whether it was barred under O.C.G.A. § 48-4-45; after the tax sale, the bidder quitclaimed the deed to the purchaser, which occurred prior to the sheriff's "administrative cancellation" of the tax sale due to procedural errors, and the purchaser's action to quiet title, pursuant to O.C.G.A. § 23-3-40 et seq., resulted in summary judgment to the executrix. Harpagon Co. v. Gelfond, 279 Ga. 59, 608 S.E.2d 597 (2005).

Action not one to quiet title. — Action to set aside a deed that conveyed a property interest did not fit within this section's definition, since the plaintiff was not seeking to cancel an instrument that placed a cloud on her title or subjected her to future liability. Wilson v. United States, 781 F. Supp. 779 (M.D. Ga. 1992).

Summary judgment proper once security deed paid in full. — In an action to remove a cloud from title, the trial court properly granted summary judgment to a bank and cancelled a recorded deed in favor of a holder, as: (1) the holder could no longer claim any legal title to the subject property once the underlying debt thereto was paid; (2) no evidence of valid renewal or extension of the note existed; and (3) the holder lacked standing to challenge any foreclosure on the debt. Northwest Carpets, Inc. v. First Nat'l Bank, 280 Ga. 535, 630 S.E.2d 407 (2006).

Employed against deed or writing. — Special master erred in concluding that the property purchaser's action to quiet title was a conventional quia timet employed to quiet title, as that action was used to quiet title as to a deed or other writing which casts a cloud over a title, whereas the property purchaser's action was a quia timet action against all the

world; however, no error occurred in denying the property claimant's motion for a jury trial even though an action against the entire world allowed for one, as the evidence did not present a question of fact that required a jury. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Prerequisites not met. — Plaintiff's claim failed because plaintiff had not alleged that plaintiff paid off the mortgage loan in full to satisfy the Security Deed or that plaintiff's signature on the Security Deed was false. Bowman v. U.S. Bank Nat'l Ass'n, 2013 U.S. Dist. LEXIS 149660 (N.D. Ga. Aug. 1, 2013).

Cited in Walker v. Walker, 266 Ga. 414, 467 S.E.2d 583 (1996); Davis v. Harpagon Co., LLC, 283 Ga. 539, 661 S.E.2d 545 (2008); Brock v. Yale Mortg. Corp., 287 Ga. 849, 700 S.E.2d 583 (2010); Richards v. Wells Fargo Bank, N.A., 325 Ga. App. 722, 754 S.E.2d 770 (2014).

23-3-43. Special master.

At the option of the complainant as prayed for in the complaint, the court, upon receipt of the complaint, shall submit the same to a special master as provided for in Code Sections 23-3-63 through 23-3-68, except that as in other equity cases there shall be no right to a jury trial. (Code 1981, § 23-3-43, enacted by Ga. L. 2000, p. 1408, § 1.)

Effective date. — This Code section became effective July 1, 2000.

Law reviews. — For article, "The New Special Master Rule — Uniform Superior Court Rule 46: Life Jackets for the Courts in the Perfect Storm," see 15 (No. 4) Ga. St. B. J. 20 (2009). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

JUDICIAL DECISIONS

No notice or hearing required. — When a defendant who asserted a quiet title claim against the plaintiffs requested a special master, the trial court was required to submit the claim to a special master, and no notice or hearing on the matter was required; once submitted, the special master had complete jurisdiction to determine the quiet title claim. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Jury trial unavailable. — While a special master erred in concluding the property purchaser's action to quiet title was a conventional quia timet action, and, thus, no jury trial was available to the property claimant, the claimant was not harmed by the error; although a jury trial was available regarding the property purchaser's action in quia timet as against all the world, the property claimant did not show that the evidence presented a question of fact, and, thus, the intervention of a jury was not required. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Trial court properly appointed a special master in a quiet title action and a corporation, who was unsuccessful in the corporation's claim for the property, was properly held not entitled to a jury trial because the suing bank had amended the bank's petition to provide for an action only for conventional quia timet by the time it was heard by the special master; therefore, no jury trial was available under O.C.G.A. § 23-3-43. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

23-3-44. Redemption and notice.

Proceedings quia timet may be used to remove clouds on title caused by equities of redemption following tax sales; provided, however, that the length of time for redemption shall remain as provided by law and nothing in this Code section shall preclude the necessity of giving all parties at interest notice of this proceeding. (Code 1981, § 23-3-44, enacted by Ga. L. 2000, p. 1408, § 1; Ga. L. 2001, p. 4, § 23; Ga. L. 2001, p. 4, § 23.)

Effective date. — This Code section became effective July 1, 2000.

The 2001 amendment, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, revised language and punctuation in this Code section.

JUDICIAL DECISIONS

Cited in Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Part 2

Quia Timet Against All the World

JUDICIAL DECISIONS

Proper use of Quiet Title Act found. — Petition to remove a 20-year leasehold interest as a cloud on the title of property was a proper use of the Quiet Title Act. Cowron & Co. v. Shehadeh, 268 Ga. 383, 490 S.E.2d 82 (1997).

Findings of master and court to be upheld unless erroneous. — In an action to quiet title brought under § 23-3-60, et seq., the findings of the special master and adopted by the trial court will be upheld unless clearly erroneous. Seignious v. Metropolitan Atlanta Rapid Transit Auth., 252 Ga. 69, 311 S.E.2d 808 (1984).

23-3-60. Purpose of part.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

JUDICIAL DECISIONS

Prerequisites not met. — Plaintiff could not succeed on a claim pursuant to the statute because plaintiff had not alleged many of the statutory prerequisites to this claim, such as including a particular description of the land involved in the proceeding, including a plat survey of the land, including a copy of the instrument upon which plaintiff's interest was based, and providing the name and address of possible adverse claimants. Bowman v. U.S. Bank Nat'l Ass'n, 2013 U.S. Dist. LEXIS 149660 (N.D. Ga. Aug. 1, 2013).

Attorney fees and expenses. — Plaintiff who brought an action to quiet title and for partitioning of property was not entitled to an award of attorney fees and expenses since the statutes providing for such actions do not provide for attorney fees and expenses and such an award

was not authorized if the case was considered one at law. Walker v. Walker, 266 Ga. 414, 467 S.E.2d 583 (1996).

Unbroken chain of title not established. — In order to show unbroken chain of title, it was necessary for plaintiff to show that persons who deeded the land were the heirs-at-law of the prior owner who had died intestate; because plaintiff failed to establish this fact, the court was not required to find in his favor, and involuntary dismissal of the action was not in error. Smith v. Georgia Kaolin Co., 269 Ga. 475, 498 S.E.2d 266 (1998).

Landowner's right to property established. — Findings entered by a Special Master, which determined that the disputed portion of an alley belonged to a landowner, and not the neighbors, by operation of the landowner's prior recorded deed, was not clearly erroneous, as: (1) the landowner received the property via a valid deed; (2) the neighbors failed to put the landowner on notice of their claim; and (3) the neighbors' claim of possession and use was insufficient. Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

In a dispute over an easement in an action to quiet title filed pursuant to O.C.G.A. § 23-3-60 et seq., the trial court granted summary judgment to plaintiff landowners, finding that they had title to the easement as delineated in the parties' plats, and permanently enjoined defendant adjacent landowners from interfering with use of that easement. Thus, a special master properly concluded that there was not clear and unequivocal evidence of an intention to abandon the easement, which had been acquired by grant, and that the mere nonuse of the easement for a period of time was insufficient to establish its abandonment. Whipple v. Hatcher, 283 Ga. 309, 658 S.E.2d 585 (2008).

Landowner's right to property not established. — Judgment of the trial court that a landowner did not have title to property by virtue of a deed was not error because by its express description, the deed upon which the landowner relied did not convey an interest in the subject property; the deed set forth a metes and bounds description that corresponded to the landowner's house and surrounding lot only, and the description did not include the subject property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Neighbor's right to property established. — Because the neighbors' actual adverse possession was inconsistent with and prevailed over the owners' mere constructive possession under O.C.G.A. § 44-5-166(a), the trial court did not err in entering the court's judgment and decree in favor of the neighbors under O.C.G.A. § 23-3-60. Sacks v. Martin, 284 Ga. 712, 670 S.E.2d 417 (2008).

It was not error for the trial court to adopt the special master's conclusion that title to certain property was vested in a landowner's neighbor because the neighbor's quitclaim deed was the only deed placed before the special master that described an interest in the subject property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Tender required. — In cases involving mortgages, Georgia law required that a party first tender the amount due under the note and security deed before seeking the equitable remedy of quiet title; the complaint did not allege that the plaintiff attempted to tender the amount due and defendants refused it, or that the defendants were likely to refuse such an offer. Moreover, the allegations in the complaint did not plausibly support the notion that the plaintiff owned the subject property free and clear, so the plaintiff's quiet title action failed. Warthen v. Litton Loan Servicing LP, No. 1:11-cv-02704-JEC, 2012 U.S. Dist. LEXIS 135748 (N.D. Ga. Mar. 23, 2012).

Used to remove any cloud of title. — Special master erred in concluding that the property purchaser's action to quiet title was a conventional quia timet employed to quiet title, as that action was used to quiet title as to a deed or other writing which casts a cloud over a title, whereas the property purchaser's action was a quia timet action against all the world; however, no error occurred in denying the property claimant's motion for a jury trial even though an action against the entire world allowed for one, as the evidence did not present a question of fact that required a jury. Gurley v. E. Atlanta

Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

Implied easement not shown. — In submitting a quiet title case to a special master, a trial court did not cede jurisdiction to render a final decision, and was not obligated to accept a special master's erroneous legal conclusion; a trial court properly rejected a special master's finding that an implied easement was established because access to an owner's home across a neighbors' property was unnecessary, but merely convenient, and because the owner's deed made no mention of a plat allegedly relied on by the owner or a right of way bordering the property, and the plat itself was not recorded. Eardley v. McGreevy, 279 Ga. 562, 615 S.E.2d 744 (2005).

Adverse possession. — In a quiet title action under O.C.G.A. § 23-3-60 et seq., appellee alleged property owner established adverse possession of a disputed tract because both appellee and a prior lessee used the tract in connection with their business on contiguous property leased from an estate from 1971-1999; appellee acquired title to a lot containing the tract from the estate in 1999. Steinichen v. Stancil, 284 Ga. 580, 669 S.E.2d 109 (2008).

Special master report properly adopted. — In a quiet title action, the trial court did not err by adopting a special master report because the report was not tainted by a conflict of interest since the special master was appointed by a stipulated conflict waiver agreed upon by the parties and there was sufficient evidence to support that only two tracts of land were conveyed to the purchaser, not four. DeCay v. Houston, 295 Ga. 223, 758 S.E.2d 286 (2014).

Jury trial available. — While a special master erred in concluding the property purchaser's action to quiet title was a conventional quia timet action, and, thus, no jury trial was available to the property claimant, the claimant was not harmed by the error; although a jury trial was available regarding the property purchaser's action in quia timet as against all the world, the property claimant did not show that the evidence presented a question of fact, and, thus, the intervention of a jury was not required. Gurley v. E. Atlanta Land Co., 276 Ga. 749, 583 S.E.2d 866 (2003).

When one seeks conventional quia timet, one is not entitled to trial by jury under O.C.G.A. § 23-3-43; when one seeks quia timet against all the world, however, one is entitled by the provisions of O.C.G.A. § 23-3-66 to a jury trial, but there is no right to a jury trial when a suit at law is converted by amendment into an equitable proceeding. Vatacs Group, Inc. v. U. S. Bank, N.A., 292 Ga. 483, 738 S.E.2d 83 (2013).

Planned street parcel conveyed in deed to property owners. — In a quiet title action brought by property owners, a trial court properly found that since the grantor who conveyed to the owners' predecessors-in-title land abutting a planned street parcel that the grantor also owned, but the street was never dedicated, the deed conveyed to the owners the interest that the grantor held in the road since there was no clear expression of a contrary intent. 1845 La Dawn Lane, LLC v. Bowman, 277 Ga. 741, 594 S.E.2d 373 (2004).

In an action to invalidate an allegedly forged quitclaim deed filed by a husband, which transferred an interest in certain property to the husband's wife, summary judgment was erroneously granted to the husband, as a bankruptcy trustee presented sufficient evidence of disputed issues of material fact concerning the husband's equitable claim; hence, the matter was remanded for further proceedings under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq. Hurst v. Evans, 284 Ga. App. 274, 643 S.E.2d 824 (2007).

Title did not ripen under tax deed. — In a quiet title action under O.C.G.A. § 23-3-60, although a corporation with a 1984 tax deed to the property in dispute claimed that ripening of title had occurred under O.C.G.A. § 48-4-48 as the corporation held the tax deed for the required seven-year period under a former version of the statute, a 1989 amendment that applied expressly to tax deeds executed prior to July 1, 1989, required adverse possession by the tax deed grantee in order for title to ripen. BX Corp. v. Hickory Hill 1185, LLC, 285 Ga. 5, 673 S.E.2d 205 (2009).

Consent judgment inappropriate over waterfront property. — As both parties did not actually consent to all of the terms of a consent judgment which purported to resolve the parties' ongoing dispute over title to waterfront property in an action under O.C.G.A. § 23-3-60, a trial court erred in issuing the consent judgment; the trial court's consent judgment impermissibly modified a condition precedent to the parties' agreement. Allen v. Sea Gardens Seafood, Inc., 290 Ga. 715, 723 S.E.2d 669 (2012).

Action must be brought in county where land lies. — Trial court erred by dismissing a credit union's quiet title action because the two causes of action at issue were neither identical nor did they resolve the same issues as the quiet title action sought to establish the credit union as the legal title holder of the Lee County, Georgia, properties, while the Dougherty County lawsuit sought to hold the credit union monetarily responsible for the allegedly unlawful acquiring of the titles to those and other properties. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Res judicata. — Trial court did not err in ruling that a church's prior quia timet action under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., barred an heir's action against the church seeking title to the property because the prior action settled the church's ownership interest in the property. Cartwright v. First Baptist Church of Keysville, Inc., 316 Ga. App. 299, 728 S.E.2d 893 (2012).

Cited in Henson v. Tucker, 278 Ga. App. 859, 630 S.E.2d 64 (2006); Thompson v. Cent. of Ga. R.R., 282 Ga. 264, 646 S.E.2d 669 (2007); Donald Azar, Inc. v. Muche, 326 Ga. App. 726, 755 S.E.2d 266 (2014).

23-3-61. Who may bring proceeding.

Law reviews. — For article, "Tracing Georgia's English Common Law Equity Jurisprudential Roots: Quia Timet," see 14 The Journal of Southern Legal History 135 (2006).

JUDICIAL DECISIONS

A plaintiff in an action to quiet title must assert, etc.

In accord with 1st paragraph in bound volume. See Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994), appeal dismissed, 269 Ga. 475, 498 S.E.2d 266 (1998).

Proof of title. — The Quiet Title Act does not require the same proof of title as an ejectment action. Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994), appeal dismissed, 269 Ga. 475, 498 S.E.2d 266 (1998).

Evidence sufficient to support plaintiff's boundaries. — In a boundary line dispute filed pursuant to O.C.G.A. § 23-3-61, the trial court properly entered judgment on a jury verdict in favor of the plaintiffs, two landowners, and against their neighbor, and then denied the neighbor a new trial, or alternatively a judgment notwithstanding the verdict, as: (1) the boundary line indicated on a plat reflecting the locations of monuments on the parcel owned by two landowners complied with the monuments referenced in the original warranty deed; and (2) the neighbor agreed to a special verdict form allowing the jury to find that the plat submitted by the two landowners accurately and sufficiently showed the true boundary line. Dover v. Higgins, 287 Ga. App. 861, 652 S.E.2d 829 (2007), cert. denied, No. S08C0402, 2008 Ga. LEXIS 237 (Ga. 2008).

All known heirs not required parties. — Action brought by decedent's grandson to quiet title to real property was not subject to dismissal for failure to join all the known heirs of the decedent. Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997).

Easement insufficient to support claim. — A homeowner's association was not entitled to bring a quiet title action against a subdivision developer; the association's allegations that the developer should convey future title and that the

association had an easement were insufficient to support a claim for quiet title, as a petition to quiet title could not depend upon an easement. Dykes Paving & Constr. Co. v. Hawk's Landing Homeowners Ass'n, 282 Ga. 305, 647 S.E.2d 579 (2007).

Res judicata. — Trial court did not err in ruling that a church's prior quia timet action under the Quiet Title Act, O.C.G.A. § 23-3-60 et seq., barred an heir's action against the church seeking title to the property because the prior action settled the church's ownership interest in the property. Cartwright v. First Baptist Church of Keysville, Inc., 316 Ga. App. 299, 728 S.E.2d 893 (2012).

Cited in Lindsey v. Lindsey, 249 Ga. 832, 294 S.E.2d 512 (1982); Holden v. State, 187 Ga. App. 597, 370 S.E.2d 847 (1988); Norton v. Holcomb, 285 Ga. App. 78, 646 S.E.2d 94 (2007).

23-3-62. Venue; contents, verification and filing of petition; filing in lis pendens docket.

JUDICIAL DECISIONS

Tax sale of property proper. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the purchaser acquired title to the property by virtue of a tax sale and deed, which was conducted in accordance with O.C.G.A. § 48-4-1 et seq.; a title search showed the testatrix's nephew as holding record title to the property, but out of caution, both the nephew and the executor were served with notice of the tax sale, the tax commissioner met with the executor prior to the sale and offered to accept payment for the back taxes, but the executor failed to do so, and the property was sold to the purchaser, with the overage going to the nephew, and the executor did not timely seek to exercise a right of redemption under O.C.G.A. § 48-4-40. Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Quiet title proceeding procedurally deficient. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the trial court was authorized to find that the executor's prior quiet title action failed to convey any interest in the property to the executor and to decree that the judgment entered in that action be removed as a cloud upon the purchaser's title when the prior quiet title proceeding was procedurally deficient; the quiet title petition was not verified as required by O.C.G.A. § 23-3-62(b), it did not include a plat of survey of the land as required by § 23-3-62(c), a lis pendens was not filed contemporaneously with the filing of the petition as required by § 23-3-62(d), the petition was not submitted to an authorized special master as required by O.C.G.A. § 23-3-63, and the record failed to establish service on any party as required by O.C.G.A. § 23-3-65(b). Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Evidence did not establish rightful owner of property. — Trial court erred in finding that a neighbor was the rightful owner of certain property because there was no evidence to support the conclusion that the neighbor owned the disputed property either by deed or by adverse possession; the legal description of the property contained in the neighbor's deed did not include the disputed property, and since the evidence showed that, at most, the neighbor made a claim to the disputed property for only eighteen years before being challenged by the landowners, the neighbor's claim to have gained prescriptive title to the property through adverse possession under O.C.G.A. §§ 44-5-161 and 44-5-165 failed as a matter of law. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Evidence supported the trial court's conclusion that landowners did not own

the disputed property because the landowners' occasional maintenance and use of the disputed property did not amount to the type of exclusive possession for twenty years that would support a claim for prescriptive title under O.C.G.A. §§ 44-5-161 and 44-5-165. Washington v. Brown, 290 Ga. 477, 722 S.E.2d 65 (2012).

Cited in Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994); Woelper v. Piedmont Cotton Mills, Inc., 266 Ga. 472, 467 S.E.2d 517 (1996); Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997).

23-3-63. Submission to special master.

Law reviews. — For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010).

JUDICIAL DECISIONS

Default improper if no special master appointed. — Default judgment against owners in a quiet title action based on their failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. § 9-11-1 et. seq., was inapplicable. Woodruff v. Morgan County, 284 Ga. 651, 670 S.E.2d 415 (2008).

Appointment of special master required. — In a quiet title action, the trial court erred by failing to appoint a special master because Georgia's Quiet Title Act, O.C.G.A. § 23-3-60 et seq., requires a trial court to appoint a special master and for that special master to make a report of the special master's findings to the trial court. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Quiet title proceeding procedurally deficient. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the trial court was authorized to find that the executor's prior quiet title action failed to convey any interest in the property to the executor and to decree that the judgment entered in that action be removed as a cloud upon the purchaser's title when the prior quiet title proceeding was procedurally deficient; the quiet title petition was not verified as required by O.C.G.A. § 23-3-62(b), it did not include a plat of survey of the land as required by § 23-3-62(c), a lis pendens was not filed contemporaneously with the filing of the petition as required by § 23-3-62(d), the petition was not submitted to an authorized special master as required by O.C.G.A. § 23-3-63, and the record failed to establish service on any party as required by O.C.G.A. § 23-3-65(b). Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Cited in Walters v. McNeese, 257 Ga. 440, 360 S.E.2d 268 (1987); DRST Holdings, Ltd. v. Agio Corp., 282 Ga. 903, 655 S.E.2d 586 (2008); Whipple v. Hatcher, 283 Ga. 309, 658 S.E.2d 585 (2008); Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008); Keever v. Dellinger, 291 Ga. 860, 734 S.E.2d 874 (2012).

23-3-64. Other required evidence.

JUDICIAL DECISIONS

Cited in Meadows v. Barker, 241 Ga. App. 753, 526 S.E.2d 643 (1999); Cernonok v. Kane, 280 Ga. 272, 627 S.E.2d 14 (2006).

23-3-65. Notice; process; service by publication; filing of adverse pleading; appointment of disinterested representative.

JUDICIAL DECISIONS

Service by publication not authorized. — Service on lender by publication was not authorized by O.C.G.A. § 23-3-65(b), nor did it comport with due process, where it did not appear that an attempt to locate the lender would have been fruitless, since there were obvious channels of information available. Floyd v. Gore, 251 Ga. App. 803, 555 S.E.2d 170 (2001).

Quiet title proceeding procedurally deficient and demonstrated failure to serve. — In a purchaser's quiet title action against the executor of a testatrix's estate, the trial court did not err in adopting the report of a special master and in decreeing that fee simple title to the land was vested in the purchaser because the trial court was authorized to find that the executor's prior quiet title action failed to convey any interest in the property to the executor and to decree that the judgment entered in that action be removed as a cloud upon the purchaser's title when the prior quiet title proceeding was procedurally deficient; the quiet title petition was not verified as required by O.C.G.A. § 23-3-62(b), it did not include a plat of survey of the land as required by § 23-3-62(c), a lis pendens was not filed contemporaneously with the filing of the petition as required by § 23-3-62(d), the petition was not submitted to an authorized special master as required by O.C.G.A. § 23-3-63, and the record failed to establish service on any party as required by O.C.G.A. § 23-3-65(b). Mann v. Blalock, 286 Ga. 541, 690 S.E.2d 375 (2010).

Special master not appointed therefore no service. — Default judgment against owners in a quiet title action based on their failure to answer was improper because, once the in rem proceeding was instituted, the trial court was required, pursuant to O.C.G.A. § 23-3-63, to submit the matter to a special master, and a special master was never appointed such that service could have properly been completed pursuant to the Quiet Title Act, O.C.G.A. § 23-3-60 et seq.; since the Quiet Title Act provided specific rules of practice and procedure with respect to an in rem quiet title action against all the world, the Civil Practice Act, O.C.G.A. § 9-11-1 et. seq., was inapplicable. Woodruff v. Morgan County, 284 Ga. 651, 670 S.E.2d 415 (2008).

Standing. — In a quiet title action brought by a homeowner with regard to a road, a developer and a county did not lack standing as possible adverse claimants. The county had a direct interest in the proceeding because the owner of the subdivision where the homeowner lived had expressly dedicated all streets delineated in the recorded subdivision plat, including the road in question, to public use; the developer also had a stake in the outcome of the case because of the developer's interest in paving the remainder of the road to provide access to the developer's new development. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107 (2008), cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Cited in Resseau v. Bland, 268 Ga. 634, 491 S.E.2d 809 (1997); Brown v. Fokes Props. 2002, Inc., 283 Ga. 231, 657 S.E.2d 820 (2008); Brown v. Fokes Props. 2002, Inc., 283 Ga. 231, 657 S.E.2d 820 (2008).

23-3-66. Jurisdiction of special master; trial by jury.

Law reviews. — For survey article on real property law, see 60 Mercer L. Rev. 345 (2008). For annual survey of law on real property, see 62 Mercer L. Rev. 283 (2010). For annual survey on real property, see 65 Mercer L. Rev. 233 (2013).

JUDICIAL DECISIONS

Demand for jury trial must be filed prior to ruling by special master.

Where a demand for a jury trial was filed before the case was heard by a special master, the trial court did not err in vacating its initial order adopting the special master's report and correctly ordered that a jury trial be held. Addison v. Reece, 263 Ga. 631, 436 S.E.2d 663 (1993).

Because the defendant demanded a jury trial after the start of the hearing in front of a special master, the superior court did not err in approving and adopting the special master's order denying as untimely the defendant's demand. Griffeth v. Griffin, 245 Ga. App. 619, 538 S.E.2d 521 (2000).

When, in a dispute over the ownership of a parcel of land between a landowner and a railroad, the landowner timely demanded a jury trial before the special master to which the case was referred ruled, it had to be decided whether there was a genuine issue of material fact for a jury to decide, and, because the railroad did not show actual or constructive possession of the disputed land as a matter of law, there was such an issue, and it was error for the trial court to deny the landowner's request for a jury. Watkins v. Hartwell R.R. Co., 278 Ga. 42, 597 S.E.2d 377 (2004).

In a suit between a church and a minister, the trial court's order striking a portion of the minister's complaint was not a final adjudication of all claims, thereby entitling the minister to appeal. It was only a determination that the minister had waived the right to a jury trial under O.C.G.A. § 23-3-66 by not filing a jury demand before a hearing was held by a special master, and not that any of the claims themselves had been waived or otherwise disposed of. Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008).

Claims outside of special master's jurisdiction not waived. — Under O.C.G.A. § 23-3-66, a special master had jurisdiction only over a church's quiet title petition, not its other claims against a minister alleging conversion of personal property and money. Therefore, the church did not waive those other claims by not raising them before the master. Rhymes v. E. Atlanta Church of God, Inc., 284 Ga. 145, 663 S.E.2d 670 (2008).

Failure to provide jury trial not error. — Since a special master found no question of fact to exist and the owners did not make present the existence of a question of fact on appeal, the failure to provide a jury trial pursuant to O.C.G.A. § 23-3-66, even if timely requested, was not error. Sacks v. Martin, 284 Ga. 712, 670 S.E.2d 417 (2008).

Appointment of special master required. — In a quiet title action, the trial court erred by failing to appoint a special master because Georgia's Quiet Title Act, O.C.G.A. § 23-3-60 et seq., requires a trial court to appoint a special master and for that special master to make a report of the special master's findings to the trial court. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Authority of special master and judge. — In a quiet title action, there was no merit to the contention that only the special master had jurisdiction to rule upon a motion for summary judgment. In submitting a quiet title case to a special master, a trial court did not cede jurisdiction to render a final decision; O.C.G.A. § 23-3-67 gave only the trial court authority to issue the final decree. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107 (2008), cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Special master, in accordance with the special master's complete jurisdiction under O.C.G.A. § 23-3-66, was entitled to review the pleadings and evidence to de-

termine the valid interests in real property because an amended pleading properly filed by a bank included claims that a grantee's foreclosure sale was improper and that title under the grantee's security deed had reverted to a promisor pursuant to O.C.G.A. § 44-14-80(a)(1). MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Master's authority to set deadlines. — In a quiet title action that was referred to a special master, the master's setting of a deadline for the parties to file motions to disqualify did not violate any statute or rule, Ga. Unif. Super. Ct. R. 25.3, nor did the setting of the deadline prevent the special master from fulfilling the master's separate obligation to ensure that the master was impartial and disinterested. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Demand for jury trial must be filed prior to special master hearing the case. — Although landowners who were defending a prescriptive easement suit by quia timet had the right to demand a jury trial of any question of fact, pursuant to O.C.G.A. § 23-3-66, when the landowners failed to file a jury demand before the special master heard the case, the special master became the arbiter of law and fact. McGregor v. River Pond Farm, LLC, 312 Ga. App. 652, 719 S.E.2d 546 (2011).

Quiet title action within special master jurisdiction. — It was not error for the trial court to adopt the special master's conclusion that title to certain property was vested in a landowner's neighbor because the neighbor's quitclaim deed was the only deed placed before the special master that described an interest in the subject property. Bailey v. Moten, 289 Ga. 897, 717 S.E.2d 205 (2011).

Report of findings to judge. — Provision in O.C.G.A. § 23-3-66 that the special master make a report of findings to the judge did not mandate a separate finding or conclusion as to each claim or defense in taxpayers' claim against an assignee of a purchaser of their property at a tax sale. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

When a defendant who asserted a quiet title claim against the plaintiffs requested a special master, the trial court was required to submit the claim to a special master, and no notice or hearing on the matter was required; once submitted, the special master had complete jurisdiction to determine the quiet title claim. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Cited in Smith v. Georgia Kaolin Co., 264 Ga. 755, 449 S.E.2d 85 (1994); Martin v. Patton, 225 Ga. App. 157, 483 S.E.2d 614 (1997); Paul v. Keene, 272 Ga. 357, 529 S.E.2d 135 (2000); Proctor v. Heirs of Jernigan, 273 Ga. 29, 538 S.E.2d 36 (2000); Fort Mt. Container Corp. v. Keith, 275 Ga. 210, 563 S.E.2d 860 (2002); Steinichen v. Stancil, 281 Ga. 75, 635 S.E.2d 158 (2006).

23-3-67. Decree; effect of recordation.

JUDICIAL DECISIONS

Court retained jurisdiction despite role of special master. — In a quiet title action, there was no merit to the contention that only the special master had jurisdiction to rule upon a motion for summary judgment. In submitting a quiet title case to a special master, a trial court did not cede jurisdiction to render a final decision; O.C.G.A. § 23-3-67 gave only the trial court authority to issue the final decree. Harbuck v. Houston County, 284 Ga. 4, 662 S.E.2d 107 (2008), cert. denied, 129 S. Ct. 641, 172 L.Ed.2d 613 (2008).

Appointment of special master required. — In a quiet title action, the trial court erred by failing to appoint a special master because Georgia's Quiet Title Act, O.C.G.A. § 23-3-60 et seq., requires a trial court to appoint a special master and for that special master to make a report of the special master's findings to the trial court. DOCO Credit Union v. Chambers, 330 Ga. App. 633, 768 S.E.2d 808 (2015).

Adoption of special master's report. — Trial court did not err by failing to grant an investment company's motion for

an oral hearing on the company's exceptions to a special master's report because a trial court was entitled to enter judgment at any time the court chose and could have done so before any exceptions were filed by the company. Therefore, if a trial court may adopt the special master's report and enter judgment even before a party has a chance to file exceptions to the report, then it cannot be error for the trial court to fail to hold an oral hearing on any exceptions before entering judgment. MPP Invs., Inc. v. Cherokee Bank, N.A., 288 Ga. 558, 707 S.E.2d 485 (2011).

Dismissal for failure to describe land triggers res judicata in later action. — Where petition to quiet title was dismissed for failure to describe land, petitioner was barred by res judicata from instituting a subsequent action for declaratory and injunctive relief based on same facts; res judicata applies not only when case was decided on merits, but also when it could have been so decided, had the case been handled appropriately by the litigants in the original case. Piedmont Cotton Mills, Inc., v. Woelper, 269 Ga. 109, 498 S.E.2d 255 (1998).

Appellant did not waive objections. — Quiet title case was remanded to the trial court for it to address the merits of the appellant's motion for a new trial as the appellant's failure to file objections before the trial court adopted a special master's report did not bar the appellant from objecting to the trial court's judgment in a motion for new trial or on appeal since O.C.G.A. § 23-3-67 made no provision for filing exceptions to the special master's report and did not require a trial court to provide notice to the parties and to conduct a hearing before adopting the special master's report. Steinichen v. Stancil, 281 Ga. 75, 635 S.E.2d 158 (2006).

No provision for filing exceptions. — O.C.G.A. § 23-3-67 makes no provision for filing exceptions to a special master's report in a suit seeking to quiet title, and does not require a trial court to provide notice to the parties and to conduct a hearing before adopting a special master's report; although a trial court is not required to hear exceptions to a special master's report, the trial court must independently evaluate the correctness of the report before adopting it as the judgment of the trial court. Steinichen v. Stancil, 281 Ga. 75, 635 S.E.2d 158 (2006).

Cited in Keever v. Dellinger, 291 Ga. 860, 734 S.E.2d 874 (2012).

23-3-68. Compensation of master and representative; taxing as part of costs.

JUDICIAL DECISIONS

Jurisdiction to order special master fees. — Filing of a notice of appeal in the underlying action deprived a trial court of jurisdiction to thereafter order the payment of interim fees to a special master because ultimate responsibility for the fees was directly related to the resolution of the quiet title action that was not yet fully resolved at the time the trial court taxed the special master's fee as costs of the action. Under such circumstances, the award of the special master's fee was improper. Avren v. Garten, 289 Ga. 186, 710 S.E.2d 130 (2011).

No hearing required. — O.C.G.A. § 23-3-68 did not require a hearing before the trial court as to the reasonableness of a special master's fees and costs; moreover, the trial court had discretion to apportion costs between the parties, and the allocation of costs was not controlled by which party prevailed. In part because taxpayers did not prevail on their claims against an assignee of the title to their property, the trial court did not err in assigning them 25 percent of the special master's fees. Boyd v. JohnGalt Holdings, LLC, 294 Ga. 640, 755 S.E.2d 675 (2014).

Award of fees was not an abuse of discretion. — A trial court's order awarding a special master $9,500 in fees, to be borne equally by the parties in a quiet title/adverse possession case, was not an abuse of discretion. Simmons v. Cmty. Renewal & Redemption, LLC, 286 Ga. 6, 685 S.E.2d 75 (2009).

23-3-69. Intervention after entering of decree.

JUDICIAL DECISIONS

Cited in Fort Mt. Container Corp. v. Keith, 275 Ga. 210, 563 S.E.2d 860 (2002).

23-3-73. Enforcement of article.

All municipalities, counties, and housing authorities shall have standing pursuant to this article. (Code 1981, § 23-3-73, enacted by Ga. L. 2006, p. 39, § 18/HB 1313.)

Effective date. — This Code section became effective April 4, 2006.

Editor's notes. — Ga. L. 2006, p. 39, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as 'The Landowner's Bill of Rights and Private Property Protection Act.'"

Ga. L. 2006, p. 39, § 25, not codified by the General Assembly, provides that the amendment to this Code section shall only apply to petitions for condemnation filed on or after April 4, 2006.

Law reviews. — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 157 (2006).

ARTICLE 4

EQUITABLE INTERPLEADER

Law reviews. — For annual survey on insurance, see 61 Mercer L. Rev. 179 (2009).

23-3-90. Interpleader; when compelled; taxing of costs, attorney's fees.

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

JUDICIAL DECISIONS

Analysis

General Consideration
Requisites for Maintenance of Interpleader
1. Close Question of Law, Conflicting Claims, and Disinterested Stakeholder
Pleading and Practice

General Consideration

Cited in Johnson v. Mayor of Carrollton, 249 Ga. 173, 288 S.E.2d 565 (1982); Taylor v. Mosley, 252 Ga. 325, 314 S.E.2d 184 (1984); Evans v. Cushing Properties, 197 Ga. App. 380, 398 S.E.2d 306 (1990); McCalla, Raymer, Padrick, Cobb, Nichols & Clark v. C.I.T. Fin. Servs., Inc., 235 Ga. App. 95, 508 S.E.2d 471 (1998); Sanders v. Riley, No. S14A1314, 2015 Ga.

LEXIS 178 (Mar. 16, 2015).

Requisites for Maintenance of Interpleader

1. Close Question of Law, Conflicting Claims, and Disinterested Stakeholder

Conflicting claims to church funds. — Trial court properly granted a bank's petition for interpleader with regard to a dispute between church members over funds held by the bank because interpleader was the appropriate method to resolve the dispute over control of the funds since the dispute was secular and not of a religious nature and the resolution of the dispute did not necessitate an impermissible intrusion or excessive entanglement into ecclesiastical matters. The bank was authorized to file the petition based on the terms of the bank's deposit agreement and O.C.G.A. § 23-3-90 once the bank learned of the dispute over the church funds. Nash v. United Bank-Thomaston, 319 Ga. App. 179, 734 S.E.2d 238 (2012).

Pleading and Practice

Successor trustee held not entitled to summary judgment. — A successor trustee that brought an interpleader action against the original trustee and a broker, involving $60,000 in compensation which the original trustee was entitled to under a court order, was not entitled to summary judgment. The claims of the two interpled parties were not adverse or competing. The original trustee only claimed compensation under the court order as a trustee, not in any other capacity, while the broker only claimed a fee as a broker. Trust Co. Bank v. Citizens & S. Trust Co., 260 Ga. 124, 390 S.E.2d 589 (1990).

Court erred in interpreting governing documents. — In an interpleader action, the trial court erred in the court's interpretation of the governing contracts as the funds held by the sheriff for a bail bond corporation were really held on behalf of the owners of the corporation in the owners' individual capacities; thus, a judgment creditor of the individuals was entitled to the funds. Freund v. Warren, 320 Ga. App. 765, 740 S.E.2d 727 (2013).

Discharge of party appropriate. — Because a husband's counterclaim for reimbursement of the husband's premium payments did not make the insurer an interested stakeholder so as to preclude its interpleader action, the trial court erred in denying the insurer's motion for discharge under O.C.G.A. § 23-3-90(a). Am. Gen. Life & Accident Ins. Co. v. Vance, 297 Ga. App. 677, 678 S.E.2d 135 (2009).

Attorneys' fees directly against prevailing claimant. — This section could not justify an attorney's fee directly against the prevailing claimant to an interplead fund. Cable Atlanta, Inc. v. Project, Inc., 749 F.2d 626 (11th Cir. 1984).

The award to a personal injury plaintiff of attorney fees and costs incurred by the plaintiff (defendant's administrator) in bringing the action was within the court's discretion, since the trial court had already allowed the administrator to recover her costs from the fund deposited in the court. Cherokee Ins. Co. v. Lewis, 204 Ga. App. 152, 418 S.E.2d 616, cert. denied, 204 Ga. App. 921, 418 S.E.2d 616 (1992).

ARTICLE 5

BILLS OF PEACE

23-3-110. Bill of peace; when entertained; ancillary injunction.

JUDICIAL DECISIONS

Trial court approval for suit required. — Trial court properly summarily dismissed an attorney's living trust's action against a beach cottage purchaser because a bill of peace and perpetual injunction had been entered and the trust

sued the purchaser without obtaining trial court approval, as required by the bill of peace and perpetual injunction. Moreton Rolleston, Jr., Living Trust v. Kennedy, 277 Ga. 541, 591 S.E.2d 834, cert. denied, 541 U.S. 1042, 124 S. Ct. 2168, 158 L. Ed. 2d 732 (2004).

ARTICLE 6

TAXPAYER PROTECTION AGAINST FALSE CLAIMS

Effective date. — This article became effective July 1, 2012.

Editor's notes. — Ga. L. 2012, p. 127, § 1-1/HB 822, not codified by the General Assembly, provides: "Part I of this Act shall be known and may be cited as the 'Georgia Taxpayer Protection False Claims Act.'"

23-3-120. Definitions.

As used in this article, the term:

(1) "Claim" means any request or demand, whether under a contract or otherwise, for money or property, and whether or not this state or a local government has title to such money or property that is:

(A) Presented to an officer, employee, or agent of the state or local government;

(B) Made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state's or local government's behalf or to advance a state or local government program or interest, and if the state or local government:

(i) Provides or has provided any portion of the money or property requested or demanded; or

(ii) Will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Such term shall not include requests or demands for money or property that the state or local government has paid to an individual as compensation for state or local government employment or as an income subsidy with no restrictions on that individual's use of the money or property.

(2) "Knowing" and "knowingly" mean that a person, with respect to information:

(A) Has actual knowledge of the information;

(B) Acts in deliberate ignorance of the truth or falsity of the information; or

(C) Acts in reckless disregard of the truth or falsity of the information.

No proof of specific intent to defraud is required.

(3) "Local government" means any Georgia county, municipal corporation, consolidated government, authority, board of education or other local public board, body, or commission, town, school district, board of cooperative educational services, local public benefit corporation, hospital authority, taxing authority, or other political subdivision of the state or of such local government, including the Metropolitan Atlanta Rapid Transit Authority.

(4) "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(5) "Obligation" means an established duty, whether fixed or not, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee based or similar relationship, from law or regulation, or from the retention of any overpayment.

(6) "State" means the State of Georgia and any state department, board, bureau, division, commission, committee, public benefit corporation, public authority, council, office, or other governmental entity performing a governmental or proprietary function for this state. (Code 1981, § 23-3-120, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822; Ga. L. 2013, p. 141, § 23/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "the Metropolitan Atlanta Rapid Transit Authority" for "MARTA" at the end of paragraph (3).

Law reviews. — For article, "The Georgia Taxpayer Protection and False Claims Act," see 65 Mercer L. Rev. 1 (2013). For annual survey on construction law, see 65 Mercer L. Rev. 67 (2013).

23-3-121. Submission of false information; liability; no application to taxation.

(a) Any person, firm, corporation, or other legal entity that:

(1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim;

(3) Conspires to commit a violation of paragraph (1), (2), (4), (5), (6), or (7) of this subsection;

(4) Has possession, custody, or control of property or money used, or to be used, by the state or local government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(5) Being authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or local government and, intending to defraud the state or local government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or local government who lawfully may not sell or pledge the property; or

(7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or local government, or knowingly conceals, knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or a local government

shall be liable to the State of Georgia for a civil penalty of not less than $5,500.00 and not more than $11,000.00 for each false or fraudulent claim, plus three times the amount of damages which the state or local government sustains because of the act of such person.

(b) The provisions of subsection (a) of this Code section notwithstanding, if the court finds that:

(1) The person committing the violation of this subsection furnished officials of the state or local government responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(2) Such person fully cooperated with any government investigation of such violation; and

(3) At the time such person furnished the state or local government with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this article with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not more than two times the amount of the actual damages which the state or local government sustained because of the act of such person.

(c) A person violating any provision of this Code section shall also be liable to the state or local government for all costs, reasonable expenses, and reasonable attorney's fees incurred by the state or local government in prosecuting a civil action brought to recover the damages and penalties provided under this article.

(d) Any information furnished pursuant to paragraph (2) of subsection (b) of this Code section shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50.

(e) This Code section shall not apply to claims, records, or statements made concerning taxes under the revenue laws of this state. (Code 1981, § 23-3-121, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.)

Law reviews. — For article, "The Georgia Taxpayer Protection and False Claims Act," see 65 Mercer L. Rev. 1 (2013).

23-3-122. Investigations by Attorney General; civil actions authorized; intervention by government; limitation on participating in litigation; stay of discovery; alternative remedies; division of recovery; limitations.

(a) The Attorney General shall be authorized to investigate suspected, alleged, and reported violations of this article. If the Attorney General finds that a person has violated or is violating this article, then the Attorney General may bring a civil action against such person under this article. The Attorney General may delegate authority to a district attorney or other appropriate official of a local government to investigate violations that may have resulted in damages to such local government under Code Section 23-3-121 and may delegate to the local government the authority to bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government as a result of such violations, as well as all multiple damages, costs, expenses, attorney's fees, and civil penalties available under Code Section 23-3-121. The Attorney General may delegate to a district attorney or local government the authority to pursue an action brought by a private person under subsection (b) of this Code section. Notwithstanding any such delegation of authority, the Attorney General shall retain the authority to continue or discontinue the prosecution of any such action and to withdraw any such authority previously delegated to a district attorney or local government.

(b)(1) Subject to the exclusions set forth in this Code section, a civil action under this article may also be brought by a private person upon written approval by the Attorney General. A civil action shall be brought in the name of the State of Georgia or local government, as applicable. The civil action may be dismissed only if the Attorney General gives written consent to the dismissal stating the reasons for consenting to such dismissal and the court enters an order approving the dismissal.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be

served on the Attorney General by certified mail or statutory overnight delivery. The complaint shall be filed in camera and under seal, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The state or, if delegated the authority by the Attorney General, local government may elect to intervene and proceed with the action within 60 days after the Attorney General receives both the complaint and the material evidence and information.

(3) The state or, if delegated the authority by the Attorney General, the local government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2) of this subsection. Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this Code section until 30 days after the complaint is unsealed and served upon the defendant.

(4) Before the expiration of the 60 day period or any extensions obtained under paragraph (3) of this subsection, the state or local government shall:

(A) Proceed with the civil action, in which case the civil action shall be conducted by the state or local government; or

(B) Notify the court that it declines to take over the civil action, in which case the person bringing the civil action shall have the right to proceed with the civil action.

(5) When a person brings a civil action under this subsection, no person other than the state or, if delegated the authority by the Attorney General, the local government may intervene or bring a related civil action based on the facts underlying the pending civil action.

(6) Any evidence and information provided to the Attorney General or his or her designee, including any district attorney or local government, by a private person in connection with an action under this Code section shall not constitute public records and shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50. Any such evidence also shall be protected by the common interest privilege and work product doctrine. To effectuate the law enforcement purposes of this article in combating fraud and false claims directed at the public's funds, it is the public policy of this state that private persons be authorized to take actions to provide to the Attorney General or local government such information and evidence.

(c)(1) If the state or local government elects to intervene and proceeds with the civil action, it shall have the primary responsibility for

prosecuting the civil action and shall not be bound by an act of the person bringing such civil action. Such person shall have the right to continue as a party to the civil action, subject to the limitations set forth in this subsection.

(2) If the Attorney General has consented to a dismissal or elected not to proceed with a civil action, a local government may dismiss the civil action, notwithstanding the objections of the person initiating the civil action, if the person has been notified by the local government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(3) The state or local government may settle the civil action with the defendant, notwithstanding the objections of the person initiating the civil action, if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(4) Upon a showing by the state or local government that unrestricted participation during the course of the litigation by the person initiating the civil action would interfere with or unduly delay the state or local government's litigation of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as:

(A) Limiting the number of witnesses the person may call;

(B) Limiting the length of the testimony of such witnesses;

(C) Limiting the person's cross-examination of witnesses; or

(D) Otherwise limiting the participation of the person in the litigation.

(d) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the civil action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation of the person in the litigation.

(e) If the state or local government elects not to proceed with the civil action, the person who initiated the civil action shall have the right to conduct the civil action. If the state or local government so requests, it shall be served with copies of all pleadings filed in the civil action and shall be supplied, without cost, with copies of all deposition transcripts. When a person proceeds with the civil action, the court may nevertheless permit the state or local government to intervene at a later date upon a showing of good cause.

(f) Whether or not the state or local government proceeds with the civil action, upon a showing by the state or local government that certain actions of discovery by the person initiating the civil action would interfere with the state or local government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the state or local government has pursued the criminal or civil investigation or proceedings with reasonable diligence, and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(g) Notwithstanding subsection (b) of this Code section, the state or local government may elect to pursue its claim through any alternate remedy available to the state or local government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the civil action shall have the same rights in such proceeding as such person would have had if the civil action had continued under this Code section. Any finding of fact or conclusion of law made in such other proceeding that becomes final shall be conclusive on all parties to a civil action under this Code section. For purposes of this subsection, a finding or conclusion shall be deemed final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(h)(1) If the state or local government proceeds with a civil action brought by a private person under subsection (b) of this Code section, such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the civil action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the civil action. Where the civil action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the person bringing the civil action, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, or State Accounting Office report, hearing, audit, or investigation; or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing such civil action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds

to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the state or local government does not proceed with a civil action under this Code section, the person bringing the civil action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. Such amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the civil action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the state or local government proceeds with the civil action, if the court finds that the civil action was brought by a person who planned and initiated the violation of this article upon which the civil action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the civil action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the civil action is convicted of criminal conduct arising from his or her role in the violation of this article, such person shall be dismissed from the civil action and shall not receive any share of the proceeds of the civil action. Such dismissal shall not prejudice the right of the State of Georgia to continue the civil action, represented by the Attorney General or local government attorney to whom the Attorney General has delegated authority.

(4) If the state or local government does not proceed with the civil action and the person bringing the civil action conducts the civil action, the court may award to the defendant its reasonable attorney's fees and expenses against the person bringing the civil action if the defendant prevails in the civil action and the court finds that the claim of the person bringing the civil action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(i) For purposes of this subsection, the term "public employee," "public official," and "public employment" shall include federal, state, and local employees and officials. No civil action shall be brought under this article by a person who is or was a public employee or public official if the allegations of such action are substantially based upon:

(1) Allegations of wrongdoing or misconduct which such person had a duty or obligation to report or investigate within the scope of his or her public employment or office; or

(2) Information or records to which such person had access as a result of his or her public employment or office.

(j)(1) No court shall have jurisdiction over a civil action brought under subsection (b) of this Code section against a member of the General Assembly or a member of the judiciary if the civil action is based on evidence or information known to the state when the civil action was brought.

(2) In no event may a person bring a civil action under subsection (b) of this Code section which is based upon allegations or transactions which are the subject of a civil or administrative proceeding to which the State of Georgia is already party.

(3) The court shall dismiss a civil action or claim under this Code section, unless opposed by the state or local government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed:

(A) In a state criminal, civil, or administrative hearing in which the state or local government or its agent is a party;

(B) In a state or local government legislative or other state or local government report, hearing, audit, or investigation that is made on the public record or disseminated broadly to the general public, provided that such information shall not be deemed publicly disclosed in a report or investigation because it was disclosed or provided pursuant to Article 4 of Chapter 18 of Title 50, the federal Freedom of Information Act, or under any other federal, state, or local law, rule, or program enabling the public to request, receive, or view documents or information in the possession of public officials or public agencies; or

(C) From the news media, provided that such allegations or transactions are not publicly disclosed in the news media merely because information of allegations or transactions have been posted on the Internet or on a computer network, unless the action is brought by the Attorney General or local government, or the person bringing the action is an original source of the information. For purposes of this subparagraph, the term "original source" means a person who:

(i) Prior to a public disclosure under this paragraph, has voluntarily disclosed to the state or a local government the information on which allegations or transactions in a claim are based; or

(ii) Has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has

voluntarily provided the information to the state or a local government before filing a civil action under this Code section.

(k) The state or local government shall not be liable for expenses which a private person incurs in bringing a civil action under this article.

(l)(1) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of a civil action under this Code section or other efforts to stop one or more violations of this article.

(2) Relief under paragraph (1) of this subsection shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An action under this subsection may be brought in the appropriate superior court of this state for the relief provided in this subsection.

(3) A civil action under this subsection shall not be brought more than three years after the date when the discrimination occurred. (Code 1981, § 23-3-122, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822; Ga. L. 2013, p. 141, § 23/HB 79.)

The 2013 amendment, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised punctuation in subparagraph (j)(3)(B).

23-3-123. Statute of limitations; service of subpoena; limitation on disclosures; intervention; preponderance of the evidence standard; effect of criminal conviction on civil actions.

(a) Except as provided in paragraph (3) of subsection (l) of Code Section 23-3-122, all civil actions under this article shall be filed pursuant to Code Section 23-3-122 within six years after the date the violation was committed or three years after the date when facts material to the right of civil action are known or reasonably should have been known by the state or local government official charged with the responsibility to act in the circumstances, whichever occurs last; provided, however, that in no event shall any civil action be filed more than ten years after the date upon which the violation was committed.

(b) A subpoena requiring the attendance of a witness at a trial or hearing conducted under Code Section 23-3-122 may be served at any place in this state.

(c) For purposes of applying subsection (b) of Code Section 9-11-9, in pleading a civil action brought under this article, the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct or any specific records or statements used if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of Code Section 23-3-121 are likely to have occurred and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government to investigate effectively and defendants to defend fairly the allegations made.

(d) If the state or local government elects to intervene and proceed with a civil action brought under subsection (b) of Code Section 23-3-122, the state or local government may file its own complaint or amend the complaint of a person who has brought an action under such subsection to clarify or add detail to the claims in which the state or local government is intervening and to add any additional claims with respect to which the state or local government contends it is entitled to relief. For statute of limitations purposes, any such state or local government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state or local government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(e) In any action brought under Code Section 23-3-122, the plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(f) Notwithstanding any other provision of law, a final judgment rendered in favor of the state or local government or the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any civil action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of Code Section 23-3-122. (Code 1981, § 23-3-123, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.)

Law reviews. — For article, "The Georgia Taxpayer Protection and False Claims Act," see 65 Mercer L. Rev. 1 (2013).

23-3-124. Venue.

All civil actions brought under this article in a court of this state shall be brought in the county where the defendant or any one defendant, in the case of multiple defendants or defendants who are not residents of the State of Georgia, resides, can be found, transacts business, or commits an act in furtherance of the submittal of a false or fraudulent claim to the state or local government. Civil actions under this article may be brought in courts of the United States and other states if there is pendent jurisdiction. (Code 1981, § 23-3-124, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.)

23-3-125. Civil investigative demands.

(a) As used in this Code section, the term:

(1) "Custodian" means the custodian, or any deputy custodian, designated by the Attorney General under paragraph (1) of subsection (j) of this Code section.

(2) "Documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document or data compilations stored in or accessible through computer or other information retrieval system, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery.

(3) "False claims law" means:

(A) This article; and

(B) Any Act of Congress or of the legislature which prohibits or makes available to the federal government, state, or any local government in any court of this state, of another state or the District of Columbia, or of local government or of the United States any civil remedy with respect to any false claim against, bribery of, or corruption of any officer or employee of any state, the District of Columbia, local government, or the United States.

(4) "False claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law.

(5) "False claims law investigator" means any attorney or investigator employed by the Department of Law or any other agency of the federal government, state, or any local government who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the state or local government or the

United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation.

(6) "Official use" means any use that is consistent with the law and the regulations and policies of the Department of Law or any other agency of the federal government, state, or any local government participating in any of the matters in question, including use in connection with internal memoranda, and reports; communications between the Attorney General or any other agency of the federal government, state, or any local government participating in the matters in question and any other agency of the federal government, state, or any local government, or a contractor of an agency of the federal government, state, or any local government, undertaken in furtherance of a federal, state, or local government or other governmental investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda, and briefs submitted to a court or other tribunal; and communications with federal, state, or local government or other governmental investigators, auditors, consultants and experts, the counsel of other parties, arbitrators, and mediators, concerning an investigation, case, or proceeding.

(7) "Person" means any natural person, partnership, corporation, association, or other legal entity, including any state or local government or political subdivision of a state.

(8) "Product of discovery" includes:

(A) The original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) Any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A) of this paragraph; and

(C) Any index or other manner of access to any item listed in subparagraph (A) of this paragraph.

(b)(1) For purposes of this Code section, whenever the Attorney General, or his or her designee, has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or his or her designee, may, before commencing a civil proceeding under subsection (a) of Code Section 23-3-122 or

other false claims law, or making an election under subsection (b) of Code Section 23-3-122, issue in writing and cause to be served upon such person a civil investigative demand requiring such person to:

(A) Produce such documentary material for inspection and copying;

(B) Answer in writing written interrogatories with respect to such documentary material or information;

(C) Give oral testimony concerning such documentary material or information; or

(D) Furnish any combination of such documentary material, answers, or testimony.

The Attorney General may delegate the authority to issue civil investigative demands under this subsection, including to a district attorney or other local government attorney. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the deputy attorney general, or an assistant attorney general shall cause to be served, in any manner authorized by this Code section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this Code section may be shared with any qui tam relator if the Attorney General or such designee determine it is necessary as part of any false claims law investigation.

(2)(A) Each civil investigative demand issued under paragraph (1) of this subsection shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation and the applicable provision of law alleged to have been violated.

(B) If such demand is for the production of documentary material, the demand shall:

(i) Describe each class of documentary material to be produced with such definiteness and certainty as to permit such documentary material to be fairly identified;

(ii) Prescribe a return date for each such class which will provide a reasonable period of time within which the documentary material so demanded may be assembled and made available for inspection and copying; and

(iii) Identify the false claims law investigator to whom such documentary material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall:

(i) Set forth with specificity the written interrogatories to be answered;

(ii) Prescribe dates at which time the answers to such written interrogatories shall be submitted; and

(iii) Identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall:

(i) Prescribe a date, time, and place at which the oral testimony shall be commenced;

(ii) Identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) Specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) Notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) Describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this Code section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the product of discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this Code section shall be a date which is not less than seven days after the date on which such demand is received, unless the Attorney General or his or her designee determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General or his or her designee shall not authorize the issuance under this Code section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney

General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary.

(c)(1) A civil investigative demand issued under subsection (b) of this Code section shall not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such documentary material, answers, or testimony would be protected from disclosure under:

(A) Standards applicable to subpoenas or subpoenas duces tecum issued by a court of the state or of the United States to aid in a grand jury investigation; or

(B) Standards applicable to discovery requests under Chapter 11 of Title 9, the "Georgia Civil Practice Act," to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this Code section.

(2) Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law, other than this Code section, preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand shall not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(d)(1) Any civil investigative demand issued under subsection (b) of this Code section may be served in this state by a false claims law investigator or by a sheriff, deputy sheriff, marshal, or deputy marshal at any place within the territorial jurisdiction of any court of this state.

(2) Any such demand or any petition filed under subsection (k) of this Code section may be served upon any person who is not found within the territorial jurisdiction of any court of this state in such manner as applicable law prescribes for service outside this state. To the extent that the courts of this state can assert jurisdiction over any such person consistent with due process, any such court shall have the same jurisdiction to take any action respecting compliance with this Code section by any such person that such court would have if such person were personally within the jurisdiction of such court. Compliance with this Code section may also be enforced in courts of other states, of the District of Columbia, and of the United States.

(e)(1) Service of any civil investigative demand issued under subsection (b) of this Code section or of any petition filed under subsection (k) of this Code section may be made upon a partnership, corporation, association, or other legal entity by:

(A) Delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) Delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) Depositing an executed copy of such demand or petition via the United States Postal Service by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Service of any such demand or petition may be made upon any natural person by:

(A) Delivering an executed copy of such demand or petition to the person; or

(B) Depositing an executed copy of such demand or petition via the United States Postal Service by registered or certified mail or statutory overnight delivery, return receipt requested, addressed to the person at the person's residence or principal office or place of business.

(f) A verified return by the individual serving any civil investigative demand issued under subsection (b) of this Code section or any petition filed under subsection (k) of this Code section setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail or statutory overnight delivery, such return shall be accompanied by the return post office receipt or other receipt of delivery of such demand.

(g)(1) The production of documentary material in response to a civil investigative demand served under this Code section shall be made under a sworn certificate, in such form as the demand designates, by:

(A) In the case of a natural person, the person to whom the demand is directed; or

(B) In the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and

made available to the false claims law investigator identified in the demand.

(2) Any person upon whom any civil investigative demand for the production of documentary material has been served under this Code section shall make such documentary material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under paragraph (1) of subsection (k) of this Code section. Such documentary material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such documentary material.

(h) Each interrogatory in a civil investigative demand served under this Code section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by:

(1) In the case of a natural person, the person to whom the demand is directed; or

(2) In the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(i)(1) The examination of any person pursuant to a civil investigative demand for oral testimony served under this Code section shall be taken before an officer authorized to administer oaths and affirmations by the laws of this state, or of the United States, or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of

the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by and in a manner consistent with Chapter 11 of Title 9, the "Georgia Civil Practice Act."

(2) The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the state or local government, any person who may be agreed upon by the attorney for the state or local government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) The oral testimony of any person taken pursuant to a civil investigative demand served under this Code section shall be taken in the county within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence, or the refusal to sign of the witness, together with the reasons, if any, given therefor.

(5) The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General or his or her designee may, for good cause, limit such witness to inspection of the official transcript of the witness's testimony.

(7)(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (b) of this Code section may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and shall not, directly or through counsel, otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the superior court under paragraph (1) of subsection (k) of this Code section for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of Title 24.

(8) Any person appearing for oral testimony under a civil investigative demand issued under subsection (b) of this Code section shall be entitled to the same fees and allowances which are paid to witnesses in the superior courts and state courts of Georgia.

(j)(1) The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this Code section and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2)(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this Code section shall transmit them to the custodian. The custodian shall take physical possession of such documentary material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4) of this subsection.

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator or other officer or employee of the Attorney General or any other agency of the state or local govern-

ment participating in an investigation of the matters in question. Such documentary material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this Code section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Attorney General or any other agency of the federal government or of a state or local government participating in an investigation of the matters in question authorized under subparagraph (B) of this paragraph. The prohibition in the preceding sentence on the availability of documentary material, answers, or transcripts shall not apply if consent is given by the person who produced such documentary material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such documentary material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the General Assembly, including any committee or subcommittee of the General Assembly, or to any other agency of the state or local government or the United States for use by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe:

(i) Documentary material and answers to interrogatories shall be available for examination by the person who produced such documentary material or answers, or by a representative of that person authorized by that person to examine such documentary material and answers; and

(ii) Transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Whenever the Attorney General, an attorney for a local government, or an attorney for any agency of a local government participating in an investigation of the matter in question has been designated to appear before any court, grand jury, or state or local government or federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or

transcripts of oral testimony received under this Code section may deliver to such attorney such documentary material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such documentary material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this Code section, and:

(A) Any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any state or local government or federal agency involving such documentary material, has been completed; or

(B) No case or proceeding in which such documentary material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such documentary material, return to such person any such documentary material, other than copies furnished to the false claims law investigator under paragraph (2) of subsection (g) of this Code section or made for the state under subparagraph (B) of paragraph (2) of this subsection, which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) In the event of the death, disability, or separation from service of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this Code section, or in the event of the official relief of such custodian from responsibility for the custody and control of such documentary material, answers, or transcripts, the Attorney General or his or her designee shall promptly:

(A) Designate another false claims law investigator to serve as custodian of such documentary material, answers, or transcripts; and

(B) Transmit in writing to the person who produced such documentary material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such documentary material, answers, or transcripts, the same duties and responsibilities as were imposed by this Code section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(k)(1) Whenever any person fails to comply with any civil investigative demand issued under subsection (b) of this Code section, or whenever satisfactory copying or reproduction of any documentary material requested in such demand cannot be done and such person refuses to surrender such documentary material, the Attorney General or local government may file in any county or district in which such person resides, is found, or transacts business and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2)(A) Any person who has received a civil investigative demand issued under subsection (b) of this Code section may file in the appropriate court and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the superior court for any county in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph shall be filed:

(i) Within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier; or

(ii) Within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A) of this paragraph and may be based upon any failure of the demand to comply with the provisions of this Code section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3)(A) In the case of any civil investigative demand issued under subsection (b) of this Code section which is an express demand for any product of discovery, the person from whom such discovery was

obtained may file in the superior court for the county in which the proceeding in which such discovery was obtained is or was last pending and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph shall be filed:

(i) Within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier; or

(ii) Within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A) of this paragraph and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this Code section or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced by, or transcripts of oral testimony given by, any person in compliance with any civil investigative demand issued under subsection (b) of this Code section, such person and, in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file in the superior court for any county within which the office of such custodian is situated and serve upon such custodian a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this Code section.

(5) Whenever any petition is filed under this subsection in any superior court for any county, such court shall have jurisdiction to hear and determine the matter so presented and to enter such order or orders as may be required to carry out the provisions of this Code section. Any final order so entered shall be subject to appeal. Any disobedience of any final order entered under this Code section by any court shall be punished as a contempt of the court.

(6) Chapter 11 of Title 9, the "Georgia Civil Practice Act," shall apply to any petition filed in this state under this subsection, to the extent that such rules are not inconsistent with the provisions of this Code section.

(l) Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (b) of this Code section shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50. (Code 1981, § 23-3-125, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822; Ga. L. 2014, p. 866, § 23/SB 340.)

The 2014 amendment, effective April 29, 2014, part of an Act to revise, modernize, and correct the Code, inserted the designation for subparagraph (k)(3)(A).

23-3-126. Remedies nonexclusive; construction of provisions.

(a) The provisions of this article shall not be deemed exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(b) This article shall be broadly construed and applied to promote the public's interest in combating fraud and false claims directed at the public's funds. (Code 1981, § 23-3-126, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.)

Code Commission notes. — Pursuant to Code Section § 28-9-5, in 2012, "This article" was substituted for "This Act" in subsection (b).

23-3-127. Proceedings involving Medicaid.

If a civil action can be commenced pursuant to Article 7B of Chapter 4 of Title 49, the "State False Medicaid Claims Act," the claimant shall proceed under Article 7B of Chapter 4 of Title 49. (Code 1981, § 23-3-127, enacted by Ga. L. 2012, p. 127, § 1-2/HB 822.)

CHAPTER 4

EQUITY PROCEDURE

ARTICLE 2

PARTIES

23-4-20. Who may complain in equity.

JUDICIAL DECISIONS

Minor children may bring wrongful death action. — Where a surviving spouse had abandoned his minor children and could not be found, the factual circumstances demand the exercise of the court's equitable powers to preserve the rights of the minor children. The trial court should have allowed these minors,

who have no remedy at law, to maintain an action for the wrongful death of their mother. Brown v. Liberty Oil & Ref. Corp., 261 Ga. 214, 403 S.E.2d 806 (1991).

ARTICLE 3

DECREES

23-4-31. Power of court to mold and enforce decrees.

JUDICIAL DECISIONS

Decree may be molded to meet exigencies of the case, etc.

Trial court was entitled to enter an order molding the verdict in continuing a nuisance case pursuant to O.C.G.A. § 23-4-31, as doing so was necessary to meet the exigencies of the case and the prayers of the landowners, and the order entered three months after judgment did not modify the judgment in any matter of substance not contemplated by the parties at the time the judgment was entered. City of Columbus v. Barngrover, 250 Ga. App. 589, 552 S.E.2d 536 (2001).

Enforcement order proper. — Trial court did not abuse its broad discretion in balancing the equities and entering a second order requiring conveyance of property in exchange for payment of the sum determined in its original order, plus interest, and refusing to order either party to reimburse the other for taxes, maintenance, or rental value related to the property. Nowlin v. Davis, 278 Ga. 240, 599 S.E.2d 128 (2004).

Enforcement of divorce decree not an impermissible modification. — Trial court's order requiring a husband to return to the wife items of jewelry which were not mentioned in the original decree was not an impermissible modification of the decree but an enforcement of a settlement agreement reached between the parties themselves, as permitted by the decree, which the court could enforce under O.C.G.A. § 23-4-31. Doritis v. Doritis, 294 Ga. 421, 754 S.E.2d 53 (2014).

Manner of enforcement of decree, etc.

An order entered by the trial court after appeal was not an impermissible modification of a final judgment, where the second decree became necessary only because the owner refused to obey the first decree. Gallogly v. Bradco, Inc., 260 Ga. 311, 392 S.E.2d 529 (1990).

Out-of-term modification of order not permitted. — Where the trial court's order is final in that the case is no longer pending in the trial court, the trial court lacks authority, in a succeeding term, to modify that order so as to relieve parties from their duty of compliance. Cobb County v. Buchanan, 261 Ga. 854, 413 S.E.2d 198 (1992).

Creation of trust for child support effectuated jury's intent. — Where, in a divorce case, the jury clearly intended to create a trust for the purpose of providing support for the minor child during his minority and they also intended that there be monthly payments from the trust for the use of the child, but the husband failed to take any substantive steps to set up the trust, there was no error in the trial court naming a trustee and providing the necessary provisions to effectuate the trust for the purpose of providing monthly child support, such as requiring the husband to make the payments necessary to keep current on his obligations for his share of the debts, encumbrances and maintenance of the trust property. Aycock v. Aycock, 251 Ga. 104, 303 S.E.2d 456 (1983).

Cited in Hudson v. Hudson, 258 Ga. 692, 373 S.E.2d 372 (1988); Getman v. Ackerly, 259 Ga. 534, 384 S.E.2d 651 (1989); Hirsh v. City of Atlanta, 261 Ga. 22, 401 S.E.2d 530 (1991).

23-4-34. Interlocutory decrees and orders.

Law reviews. — For survey article on trial practice and procedure, see 34 Mercer L. Rev. 299 (1982).

JUDICIAL DECISIONS

No right to jury trial created. — In view of the repeal of Code 1933, § 37-1104 providing for jury trials of fact in equity cases, the last sentence of this section does not create, by negative implication, a right to trial by jury. Cawthon v. Douglas County, 248 Ga. 760, 286 S.E.2d 30 (1982).

23-4-35. Confirmation of sales under decrees.

Law reviews. — For survey article on business associations, see 34 Mercer L. Rev. 13 (1982). For article, "Buying Distressed Commercial Real Estate: What are the Alternatives?," see 16 (No. 4) Ga. St. B.J. 18 (2010).

JUDICIAL DECISIONS

Analysis

General Consideration

General Consideration

Cited in Leggett v. Ogden, 248 Ga. 403, 284 S.E.2d 1 (1981); Pack v. Mahan, 294 Ga. 496, 755 S.E.2d 126 (2014).